CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 232

THE HOME INSURANCE COMPANY AND FRANKLIN FIRE INSURANCE COMPANY, APPELLANTS,

vs.

C. J. DICK, TEXAS & GULF STEAMSHIP COMPANY, AND SUDERMAN & YOUNG, INC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

FILED JULY 11, 1929

(34,363)

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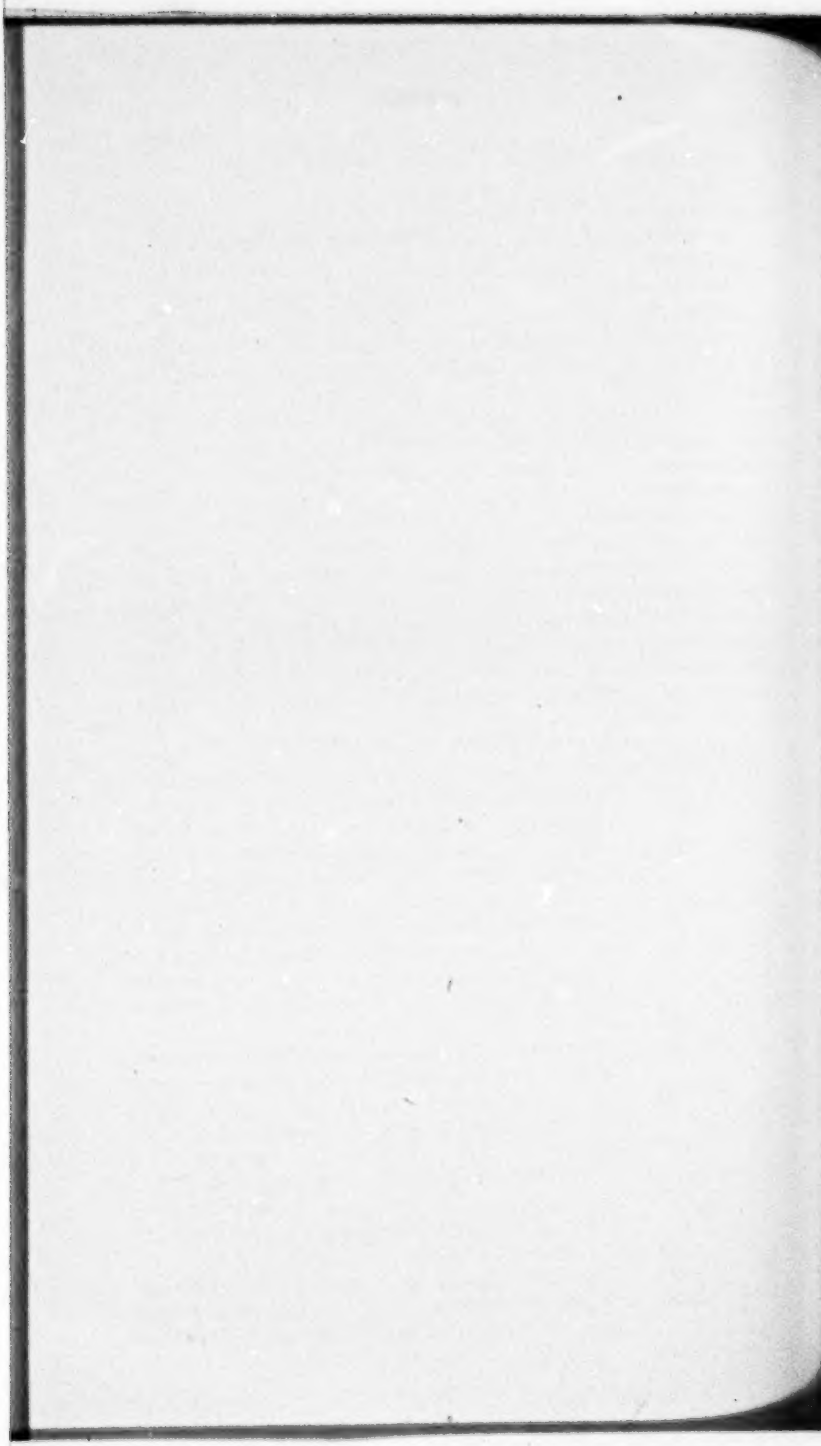

[fols. a-4] [Captions omitted]

[fol. 5]

IN DISTRICT COURT OF GALVESTON COUNTY

No. 39643

C. J. DICK

vs.

COMPANIA GENERAL ANGLO-MEXICANA DE SEGUROS, S. A.

ORIGINAL PETITION—Filed Oct. 27, 1923

The plaintiff, C. J. Dick, complaining of the defendant, Compania General Anglo-Mexicana de Seguros, S. A. would show to the Court that the plaintiff is a resident citizen of Galveston County, Texas, while the defendant is a corporation duly incorporated under the laws of the Republic of Mexico, and a non-resident of the State of Texas, but with property, assets and effects within reach of the jurisdiction of this Court.

For cause of action herein, plaintiff alleges that he heretofore, to-wit, on or about the 18th day of March, 1921, he was, as the lawful custodian, in possession of a certain vessel and tugboat known as the R. Waverly (sometimes known and referred to as the Waverly R.) and in which said vessel the plaintiff had a beneficial and insurable interest; that about the date hereinabove set forth said vessel was being used in and around the waters of the harbor of Tampico in the Republic of Mexico, and the plaintiff desired that the same be insured; that on the 18th day of March, 1921, the defendant, acting by and through its duly authorized agents, insured the aforesaid vessel, the R. Waverly, its tackle, apparel, equipment, etc. for a valuable consideration by policy 18,098, against sinking and burning, in the sum of $35,000.00 in the name of Charles B. Bonner of Tampico, but for the benefit of and loss, if any, payable to the plaintiff and to the Texas & Gulf Steamship Company, as their interest might appear which said insurance was in force from noon on March 18, 1921, to noon on March 18, 1922;

[fol. 6] That, later, the interest of Charles B. Bonner in said policy was transferred to one A. W. Turner of Tampico, Mexico, and on July 18, 1921, the entire interest of said A. W. Turner in said policy was transferred to the plaintiff;

That thereafter, and on or about the — day of July, 1921, said vessel, the R. Waverly, caught fire and was burned to such an extent as to cause her to sink in the harbor at Tampico, Mexico, and said vessel became thereby, and was, a total loss; that plaintiff has made proper proof of said loss and has delivered said proof to the defendant; that by reason of the facts herein alleged, the defendant became liable and promised to pay plaintiff the full amount of said policy, and plaintiff has made due demand for the payment of said policy from said defendant; that in spite of all the facts herein alleged, the plaintiff has denied and now denies any liability whatever in this connection, and has refused to make any kind of payment whatever on account of the loss hereinabove referred to, although liable to the plaintiff to the full extent of said policy and interest;

That by reason of all the premises, plaintiff has been damaged in the full sum of $35,000.00, with lawful interest on said claim from the first day of August, 1921;

Wherefore, plaintiff prays for citation by publication herein, garnishment proceedings having been commenced contemporareonsly herewith, and that upon due return of said citation he have judgment for his debt, as hereinabove alleged; costs of suit and such other and further relief as he may show himself entitled to in law or in equity.

H. C. Hughes, Attorney for Plaintiff.

[fol. 7] The State of Texas,
County of Galveston:

C. J. Dick, the plaintiff, being first duly sworn, on oath deposes and says: that the Compania Anglo Mexicana De Surkuros S. A., is a corporation duly organized under the laws of Mexico, and that said corporation is a non-resident of the State of Texas. Wherefore, he prays for citation by publication.

C. J. Dick.

Sworn to and subscribed before me this 27th day of Oct., A. D. 1923. W. E. Price, Notary Public in and for Galveston County, Texas.

[File endorsement omitted.]

In District Court of Galveston County

No. 39643

[Title omitted]

Order Appointing Attorney to Represent Absent Defendant

It is ordered by the Court that Ballinger Mills, Esq., a practicing attorney of this Court be and he is hereby appointed by the court to represent the absent defendant herein who has been duly cited by publication and who has failed to appear or answer in this cause.

[fol. 8] In District Court of Galveston County

No. 39643

[Title omitted]

Original Answer—Filed Jan. 14, 1927

Now comes the defendant in the above numbered and entitled cause, acting by and through Terry Cavin & Mills, Attorneys heretofore appointed by this court to represent it, and without waiving any defects in the service hereof, and without any appearance herein, except by said attorneys appointed by the court, answers plaintiff's petition herein filed, and respectfully shows to the court:

Defendant excepts and demurs to plaintiff's petition herein filed, and says that the same is insufficient in law and shows no cause of action against it, and of this the judgment of the court is prayed.

Terry, Cavin & Mills, Attorneys for said Defendant.

And for answer herein, if required, defendant denies each and every, all and singular, the allegations in plaintiff's petition contained, and demands strict proof thereof and of this it puts itself upon the country.

Terry, Cavin & Mills, Attorneys for said Defendant.

Specially pleading herein, if required, defendant says that plaintiff ought not to have or maintain this suit against it, because the policy of insurance mentioned in and declared upon by plaintiff's original petition, contained a stipulation and provision reading as follows:

"It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs."

[fol. 9] That said policy was issued in the Republic of Mexico and that the above quoted provision thereof was and is valid and enforceable under the laws of the Republic of Mexico, and that the said contract was performable and intended to be performed in Mexico, and the clause above quoted is and was valid as a defense to any suit brought to recover on said policy after the expiration of one year from the date of the accrual of the cause of action or damage to the vessel mentioned in plaintiff's petition; that this suit was not filed within one year from and after the accrual of said cause of action and this defendant here now specially pleads said fact and the said provision and stipulation of said policy in bar of plaintiff's right of action herein and prays that this suit be dismissed.

Terry, Cavin & Mills, Attorneys for Defendant.

And for further and special answer herein, if required, this defendant alleges that the contract sued on by plaintiff herein was made in the Republic of Mexico and intended to be performed in the Republic of Mexico, and was subject to the laws of the said Republic of Mexico, which contain certain provisions in Articles 1038, 1039 and 1043, of the Commercial Code of the Republic of Mexico, which was in force at the time of the issuance of said policy, and at the time of the accrual of plaintiff's cause of action herein, and which read as follows:

Article 1038. "The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code."

Article 1039. "The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against same is given."

[fol. 10] Article 1043. "One year shall prescribe actions derived from contracts of life insurance, sea and land."

That under and by virtue of the above quoted provisions of the Mexican laws, any cause of action such as that asserted by the plaintiff herein is and was barred if no suit was instituted thereon within one year from the date of the accrual thereof, and this defendant here now specially pleads that this suit was not instituted within such one-year period, and pleads such fact and the provisions of the said commercial code of the Republic of Mexico in bar of this suit, and prays that this suit be dismissed.

Terry, Cavin & Mills, Attorneys for Defendant.

This defendant further specially pleads that the policy declared on by plaintiff herein was void from the inception because it was then represented to the defendant that the value of the vessel alleged to have been insured thereby was in excess of the amount of such policy, and defendant alleges that in fact said representations of plaintiff were not true, and the value of said vessel was not as much as the amount of such policy.

Defendant stands ready to verify the foregoing.

Terry, Cavin & Mills, Attorneys for Defendant.

Defendant further pleading, alleges that the said vessel was not a total loss, and that notwithstanding such fact, the said vessel was abandoned by the plaintiff without notice to this defendant, in violation of the terms of the policy, and that it was the duty of the plaintiff, under the terms of the said policy, to repair said vessel at the cost and expense of defendant, and defendant is liable, if at all, only for the cost of such repairs, and not for the face of such policy.

[fol. 11] Defendant stands ready to verify the foregoing.

Terry, Cavin & Mills, Attorneys for Defendant.

[File endorsement omitted.]

In District Court of Galveston County

[Titles omitted]

Plaintiff's General Demurrer—Filed July 26, 1927

Now comes the plaintiff, C. J. Dick in the above entitled and numbered causes and demurs generally to the answer of the defendant and the garnishees herein and says that said answers show no defense to his cause of action and prays judgment of the court.

Further and specially demurring herein, plaintiff says that that part of the answer of the defendant and the garnishees which undertakes to set up a contractual limitation and which undertakes to set up the limitation of the Republic of Mexico fail to show any defense to the cause of action herein and should be stricken out.

(a) Because the portions alleged in said answer as being contained in said policy do not form a portion of the cause of action.

[fol. 12] (b) Because the statute of the State of Texas prohibits a contractual limitation of less than two years.

(c) Because said matters are in violation of the public policy of the State of Texas and void in this court.

Wherefore plaintiff prays that said parts of the answer be stricken out and held for naught.

Not waiving the foregoing demurrers, but relying thereon this plaintiff denies all and singular the allegations in the answer of the above named defendant and garnishees contained.

H. C. Hughes, Williams, Neethe & Williams, Attorneys for Plaintiff and Intervenors.

[File endorsement omitted.]

In District Court of Galveston County

No. 39643

C. J. Dick

vs.

Compania General Anglo-Mexicana De Seguros, S. A.

Judgment, Notice of Appeal, etc.—July 26, 1927

On this the 26th day of July, 1927, came on to be heard the above entitled and numbered cause, and there appeared the plaintiff therein C. J. Dick in person and by his attorneys, and also appeared the intervenors Texas & Gulf Steamship Company and Suderman & Young, Inc., in person and by their attorneys, and there appeared the defendant Compania General Anglo-Mexicana de Seguros, S. A., a corporation, which is a non-resident of this State and which was duly cited by publication, by the attorneys heretofore appointed herein by the Court, Messrs. Terry, Cavin & Mills, to represent said defendant; and a jury having been waived and the parties having agreed to sub-
[fol. 13] mit all matters in controversy between them to the Court for determination; and the Court having heard the evidence and the argument of counsel, is of the opinion that the law is with the plaintiff and the intervenors herein. It is therefore ordered, adjudged and decreed that the plaintiff herein C. J. Dick do have and recover of and from the defendant the sum of Seventeen Thousand Five Hundred and Eigthy-seven and 50/100 Dollars ($17,587.50), and that said intervenors herein Texas & Gulf Steamship Company, a corporation, and Suderman & Young, Inc., do have and recover against the said defendant the sum of Nineteen Thousand and Eighty Seven Dollars and Fifty Cents ($19,-087.50), together with costs in this behalf incurred, said sums having been brought within the jurisdiction of this Court by writs of garnishment duly issued in cause No. 39,645, entitled C. J. Dick vs. The Home Insurance Co. and the Franklin Fire Insurance Company, garnishees of Compania Anglo-Mexicana de Seguros, S. A. defendant herein. It is further ordered, adjudged and decreed that no execution or other process shall ever issue on this judgment ex-

cept in so far as the same may be enforced against property and assets now within the jurisdiction of this Court. It is further ordered, adjudged and decreed that the sum of Two Hundred Fifty Dollars ($250.00) be taxed as part of costs in this case in favor of Terry, Cavin & Mills, heretofore appointed attorneys to represent the defendant cited by publication and that all costs in this cause are to be deducted from the recovery of the plaintiff and intervenors herein. To which judgment, order and decree the defendant, Compania General Anglo-Mexicana de Seguros, S. A. duly excepted and in open court gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial Dis-
[fol. 14] trict of Texas at Galveston and ninety (90) days from and after the adjournment of this Court is allowed said defendant for the filing of statements of acts and bills of exception herein.

IN DISTRICT COURT OF GALVESTON COUNTY

[Titles omitted]

FINDINGS OF FACT & CONCLUSIONS OF LAW—Filed July 26, 1927

Findings of Fact

I

I find that on the 18th day of March, 1921, the defendant, the Compania General Anglo-Mexicana de Seguros, S. A. issued its policy No. 18098 to Charles B. Bonner of Tampico, Mexico, wherein said company insured the tug R. Waverly also known as Waverly R., for a period of one year from the last named date, for the sum of Thirty-five Thousand ($35,000.00) Dollars, the loss or damage under said policy being payable to the Texas & Gulf Steamship Company and C. J. Dick, as their respective interests might appear; and that the defendant received from the parties interested the full amount of premium demanded for the issuance of said policy.

[fol. 15]

II

I find that on May 24th, 1921, all the right of Charles B. Bonner in said policy was transferred to A. W. Turner, and that on July 18th, 1921, all the rights of A. W. Turner in said policy were transferred to and solely vested in the plaintiff, C. J. Dick.

III

I find that the plaintiff C. J. Dick, had a beneficial and insurable interest in said vessel, and that said policy hereinabove described, as originally issued was for the benefit of the plaintiff, C. J. Dick, and the Texas & Gulf Steamship Company, according to the respective interests of said parties in said vessel. That thereafter Sunderman & Young, Inc., acquired an interest in said policy or the proceeds thereof. I find that while said policy was in full force and effect, and on the 27th day of July, 1921, the vessel insured under the policy hereinabovedescribed, took fire and was burned and sunk in the harbor of Tampico, Mexico, and thereby became and was a total loss, said facts being made known to the insurance company by the proof of total loss required by the policy.

V

I find that on the 29th day of March, 1921, the duly authorized agents of the Home Insurance Company and the Franklin Fire Insurance Company in Mexico City issued notices to said companies that each of them was bound for re-insurance in the sum of Fifteen Thousand ($15,000.00) Dollars under the policy No. 18098, and that said notices of re-insurance and the premiums for same were accepted and acted upon by the Home Insurance Company and the Franklin Fire Insurance Company.

VI

I also find that the plaintiff and intervenors have demanded payment of the defendant, and that no payment has ever been made.

[fol. 16] VII

I find that C. J. Dick, the plaintiff, left Mexico where he was temporarily sojourning, within about ten days after the total loss of the R. Waverly, and that he has never at any time been a permanent resident of the Republic of Mexico, but that he has at all times been a resident citizen of the State of Texas.

VIII

I find that garnishments were issued in cause No. 39645 and that there is now in the hands of each of the garnishees The Home Insurance Company and the Franklin Fire Insurance Company, Fifteen Thousand ($15,000.00) Dollars, making a total sum of Thirty Thousand ($30,000.00) Dollars belonging and due to the original defendant, Compania General Anglo-Mexicana De Seguros S. A., in the hands of said garnishees, together with interest on said sum from December 3, 1923, on which date the garnishees filed their answers in garnishment wherein they denied that they were indebted to the original defendant, Compania General Anglo-Mexicana de Seguros, S. A.

Conclusions of Law

I

I conclude as a matter of law that by reason of the policy and the total loss of said vessel, and the proof of same, the plaintiff and those entitled thereto in connection with the plaintiff should have judgment for the amount of money brought within the jurisdiction of this Court by garnishments issued in cause No. 39,645.

II

I further conclude that the plaintiff and the intervenors, they having agreed among themselves as to the amounts due between them, should have judgment against the garnishees for the sum sequestered by garnishment, and which said sum is found to be due from the garnishees to the orig-
[fols. 17-31] inal defendant.

To which findings of fact and conclusions of law the defendant and the garnishees except.

Dated at Galveston, Texas, July 26, 1927.

C. G. Dibrell, Judge.

[File endorsement omitted.]

Bond on appeal for $1000.00, approved and filed August 11, 1927, omitted in printing.

[fol. 32] In District Court of Galveston County

No. 39645

C. J. Dick

vs.

The Home Insurance Company et al., Garnishees of Compania General Anglo-Mexicana de Seguros, S. A.

Affidavit for Garnishment—Filed Oct. 27, 1923

Now comes C. J. Dick, plaintiff in the above entitled and numbered cause, and makes application for a writ of garnishment against The Home Insurance Company, a corporation duly incorporated, and against the Franklin Fire Insurance Company, a corporation duly incorporated, and being duly sworn says: that plaintiff has instituted a suit for debt against Compania General Anglo-Mexicana de Seguros, S. A. defendant, to recover the sum of $35,000.00 with six per cent interest from August 1, 1921; that said debt is just, due and unpaid, and that the defendant has not, within affiant's knowledge, property in its possession within this State subject to execution sufficient to satisfy such debt; that the garnishment is not sued out to injure either the defendant or the garnishee or either of them; that the said garnishees, The Home Insurance Company, is a corporation as aforesaid, duly incorporated;

doing a general insurance business, and having a permit to do business within the State of Texas, and having a local agent in Galveston County Texas, in the person of Fred M. Burton, upon whom service can be had; pany is corporation as aforesaid, duly incorporated, doing a general insurance business and having a permit to do business within the State of Texas, and having a local agent in Galveston County, Texas, in the person of John Adriance, Jr., upon whom service can be had; that affiant has reason to believe, and does believe, that the said garnishees are indebted to the Compania General Anglo-Mexicana [fol. 33] de Seguros, S. A. defendant, or have in their hands effects belonging to said defendant.

C. J. Dick.

Sworn to and subscribed before me this 27th day of October, A. D. 1923. W. E. Price, Notary Public in and for Galveston County, Tex. (Seal.)

Wherefore plaintiff prays that a writ of garnishment issue against the Home Insurance Company and the Franklin Fire Insurance Company, garnishees.

C. J. Dick, Plaintiff.

[File endorsement omitted.]

In District Court of Galveston County

[Title omitted]

Order Granting Tex. & Gulf SS. Co. & Suderman & Young Leave to Intervene for Their Interest

Leave is granted Texas & Gulf Steamship Company and Suderman & Young to intervene for their interest.

In District Court of Galveston County

[Title omitted]

Intervention of Tex. & Gulf S/S. Co. & Suderman & Young—Filed Nov. 5, 1923

Now comes the Texas & Gulf Steamship Company a corporation doing business under and by virtue of the laws of

the State of Texas, and Suderman & Young, Inc., a corporation doing business under and by virtue of the laws of the State of Texas, and leave of the court first had and obtained, files this their plea of intervention and respectfully represent to the Court:

[fol. 34]

1

That the plaintiff herein is justly and truly indebted to the intervenor the Texas & Gulf Steamship Company in the sum of Fourteen thousand Dollars ($14,000.00) together with interest thereon from the 21st day of December, 1920; that the insurance sued for by the plaintiff here is made payable to this intervenor as its interest might appear;

That the said intervenor sold to the plaintiff herein the vessel called the "R. Waverly" under a written agreement by which title to said vessel should remain in the intervenor herein, the Texas & Gulf Steamship Company, until said purchase price should be fully paid, and that by reason of plaintiff's failure to pay said purchase price, the insurance money herein sued for is payable to said intervenor, the Texas Gulf & Steamship Company, to the extent of its indebtedness hereinbefore more fully set out, as well as for the indebtedness more fully set out in the succeeding paragraph of this plea in intervention.

2

That without the knowledge and consent of this intervenor and in violation of an agreement made and entered into by and between this intervenor and the said Dick, the said plaintiff Dick took said vessel beyond the jurisdiction of the United States and into the jurisdiction of the Republic of Mexico.

That in an endeavor to regain possession of said vessel and at the special instance and request of said Dick, this intervenor expended for counsel fees and other expenses the sum of Three Thousand Dollars ($3,000.00) for which said amount the said plaintiff is liable to this intervenor, and being so liable, promised and agreed to repay the same to this intervenor, whenever the insurance money for which this suit was brought should be collected by him.

[fol. 35] 3

And said intervenor, Suderman & Young, Inc., would show that prior to the time that the said Dick took said vessel beyond the jurisdiction of the United States, as hereinbefore more fully set out, and on or about the — day of ——, ——, as the special instance and request of said plaintiff, it installed a new engine therein of the reasonable worth and value of six thousand dollars ($6,000.00), which amount the said Dick promised and agreed to pay this intervenor therefor, and to secure which amount a lien was retained on said vessel.

4

That by reason of the foregoing, they have a lien on said vessel, subject only to the lien of the Texas & Gulf Steamship Company, on the insurance monies sought to be recovered herein.

Wherefore these intervenors pray that they may have judgment against the said Dick for the amount claimed by them respectively and judgment against the insurance company, the Compania General Anglo-Mexicana De Seguros, S. A. and that they have judgment also against the garnishees herein, in the event it is ascertained that they have any funds belonging to the said Compania General Anglo-Mexicana de Seguros, S. A. in their possession. And these intervenors pray for such other and further relief as they may be entitled to at law or in equity.

John L. Darrouzet, Williams & Neethe, Attorneys for Intervenors.

[File endorsement omitted.]

[fol. 36] In District Court of Galveston County

[Title omitted]

Original Answer of the Home Insurance Co.—Filed Dec. 3, 1923

To said Honorable Court:

Now comes the Home Insurance Company, one of the garnishees in the above numbered and entitled cause, and

answering the writ of garnishment served on it herein, respectfully shows to the court that it is not indebted to the said Compania General Angle-Mexicana de Seguros, S. A. in any sum whatsoever, and was not indebted to the said Compania General Anglo Mexicana de Seguros, S. A. in any sum whatsoever at the time of the service of the writ of garnishment upon it herein, and has not been indebted to the said Compania General Anglo-Mexicana de Seguros, S. A. in any sum whatsoever at any time between the time of the service of the writ or garnishment upon it herein and the time of filing of this answer in garnishment. That it has no effects of the said Compania General Anglo-Mexicana de Seguros, S. A. in its possession and had no effects of said Compania General Anglo-Mexicana de Seguros, S. A. in its possession at the time of the service of the writ of garnishment upon it herein, and has not had any effects of said Compania General Anglo-Mexicana, S. A. in its possession at any time between the time of the service of the writ of garnishment upon it herein and the filing of this answer. That there are no other persons within its knowledge who are indebted to said Compania General Anglo-Mexicana de Seguros, S. A., or who have effects bel-nging to it in their possession.

[fol. 37] This garnishee respectfully alleges that it has been compelled to employ counsel to represent it in this garnishment and to prepare and file this answer for it, and having fully answered herein prays that it may be hence discharged with its costs, and that it recover such reasonable atorneys's fees as the court may see fit to allow it.

Terry, Cavin & Mills, Attorneys for Garnishee, the Home Insurance Company.

Duly sworn to by C. A. Hulme. Jurat omitted in printing.

[fol. 38] [File endorsement omitted.]

IN DISTRICT COURT OF GALVESTON COUNTY

[Title omitted]

ORIGINAL ANSWER OF THE FRANKLIN FIRE INS. CO., GARNISHEE—Filed Dec. 3, 1923

To said Honorable Court:

Now comes the Franklin Fire Insurance Company, one of the garnishees in the above numbered and entitled cause, and answering the writ of garnishment served on it herein, respectfully shows to the court:

That it is not indebted to the said Compania General Anglo-Mexicana de Seguros, S. A. in any sum whatsoever, and was not indebted to the said Compania General Anglo-[fol. 39] Mexicana de Seguros, S. A. in any sum whatsoever at the time of the service of the writ of garnishment upon it herein, and has not been indebted to the said Compania General Anglo-Mexicana de Seguros, S. A. in any sum whatsoever at any time between the time of the service of the writ of garnishment upon it herein and the time of the filing of this answer in garnishment. That it has no effects of the said Compania General Anglo-Mexicana de Seguros, S. A. in its possession, and had no effects of said Compania General Anglo-Mexicana de Seguros, S. A. in its possession at the time of the service of the writ of garnishment upon it herein, and has not had any effects of said Compania General Anglo-Mexicana de Seguros, S. A. in its possession at any time between the time of the service of the writ of garnishment upon it herein and the filing of this answer. That there are no other persons within its knowledge who are indebted to said Compania General Anglo-Mexicana de Seguros, S. A., or who have effects belonging to it in their possession.

This garnishee respectfully alleges that it has been compelled to employ counsel to represent it in this garnishment and to prepare and file this answer for it, and having fully answered herein prays that it may be hence discharged with its costs, and that it recover such reasonable attorney's fees as the Court may see fit to allow it.

Terry Cavin & Mills, Attorneys for Garnishee, Franklin Fire Insurance Co.

Duly sworn to by C. A. Hulme. Jurat omitted in printing.

[fol. 40] [File endorsement omitted.]

[fol. 41] In District Court of Galveston County.....

[Title omitted]

Controverting Affidavit of Plaintiff, C. J. Dick—Filed July 5, 1924

Now comes the plaintiff in the above entitled and numbered cause and files this his controverting affidavit to the answer heretofore filed herein by the Home Insurance Company, on December 3, 1923, and shows to the Court that the said Garnishee, The Home Insurance Company is indebted to the defendant herein, The Compania General Anglo-Mexicana de Seguros, S. A. in the sum of Fifteen Thousand Dollars ($15,000) for the reasons following:

That heretofore on or about March 18, 1921, the defendant herein made, executed and delivered to the plaintiff herein its certain policy of marine insurance, wherein and whereby it insured the Launch "R. Waverly" or "Waverly R." against the perils of the sea, fire and sinking, in the sum of Thirty-five Thousand Dollars; that thereafter, and while said policy of marine insurance remained of full force and effect, the said Launch "R. Waverly" became a total loss within the terms of said marine insurance policy; that though payment of the amount due under said policy was duly demanded by the plaintiff herein from said defendant, the said amount has not been paid, or any part thereof;

And this plaintiff would further show that shortly after the date of said policy issued by the defendant, the Compania General Anglo-Mexicana de Seguros, S. A., to him, and at a date not known to this plaintiff, but known to the garnishee herein, the said defendant reinsured its obligation under the policy issued by it to the plaintiff with the garnishee, The Home Insurance Company, in the sum of [fol. 42] Fifteen Thousand Dollars ($15,000.00).

That upon the loss of said launch "R. Waverly" as herein before more fully shown and by reason of the contract of reinsurance existing between the defendant herein and the garnishee, The Home Insurance Company, there became due and payable from the garnishee herein to the said defendant the sum of Fifteen Thousand Dollars, and that said garnishee has in its possession the sum of Fifteen Thousand Dollars belonging to the said defendant, The Compania General Anglo-Mexicana de Seguros, S. A.

Wherefore plaintiff prays that he may have a judgment against the said garnishee in the sum of Fifteen Thousand Dollars ($15,000.00), together with interest thereon from the date of the loss of said launch "R. Waverly", and for his costs in his behalf expended.

C. J. Dick.

Duly sworn to by C. J. Dick. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 43] In District Court of Galveston County

No. 39645

[Title omitted]

Controverting Affidavit of Plaintiff, C. J. Dick—Filed July 5, 1924

Now comes the plaintiff in the above entitled and numbered cause and files this his controverting affidavit to the answer heretofore filed herein by the Franklin Fire Insurance Company on December 3, 1923, and shows to the court that the said Garnishee, Franklin Fire Insurance Company is indebted to the defendant herein, the Compania General Anglo-Mexicana de Seburos, S. A. in the sum of Fifteen Thousand Dollars ($15,000.00) for the reasons following:

That heretofore on or about March 18, 1921, the defendant herein made, executed and delivered to the plaintiff herein its certain policy of marine insurance, wherein and

whereby it insured the launch "R. Waverly" or "Waverly R." against the perils of the sea, fire and sinking, in the sum of Thirty-five Thousand Dollars; that thereafter, and while said policy of marine insurance remained of full force and effect, the said launch "R. Waverly" became a total loss within the terms of said marine insurance policy; that though payment of the amount due under said policy was duly demanded by the plaintiff herein from said defendant, the said amount has not been paid, or any part thereof;

And this plaintiff would further show that shortly after the date of said policy issued by the defendant, Compania General Anglo-Mexicana de Seguros, S. A., to him, and at a date not known to this plaintiff, but known to the garnishee herein, the said defendant reinsured its obligation under the policy issued by it to the plaintiff with the gar-[fol. 44] nishee, the Franklin Fire Insurance Company in the sum of Fifteen Thousand Dollars ($15,000.00);

That upon the loss of said launch, as hereinbefore more fully shown and by reason of the contract of reinsurance existing between the defendant herein and the garnishee, the Franklin Fire Insurance Company, there became due and payable from the garnishee herein to the said defendant the sum of Fifteen Thousand Dollars, and that said garnishee has in its possession the sum of Fifteen Thousand Dollars belonging to the said defendant, the Compania General Anglo-Mexicana de Seguros, S. A.

Wherefore plaintiff prays that he may have a judgment against the said garnishee for the sum of Fifteen Thousand Dollars ($15,000.00) together with interest thereon from the date of the loss of said launch "R. Waverly" and for his costs in his behalf expended.

C. J. Dick.

Duly sworn to by C. J. Dick. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 45] In District Court of Galveston County

No. 39645

[Title omitted]

Answer of Garnishees to Plaintiff's Controverting Plea—Filed Jan. 14, 1927

Now comes the Garnishees in the above numbered and entitled cause, and answering the controverting affidavits herein filed by plaintiff and by the intervenor, respectfully show to the court:

That it is not true that by reason of the contract of reinsurance existing between these garnishees and the defendant herein, there became due and payable from the garnishees to said defendant the sum of Fifteen Thousand and 00/100 Dollars ($15,000.00) from each of these garnishees; but that to the contrary, the liability of these garnishees to said defendant is solely to indemnify it against any loss or judgment that it might have to pay upon said policy of insurance; that it is not true that these garnishees each have in their possession the sum of Fifteen Thousand and 00/100 Dollars, ($15,000.00) belonging to the defendant, Compania General Anglo-Mexicana de Seguros, S. A.

These garnishees further respectfully show to the court that the only manner in which it is claimed that this court has jurisdiction over the defendant is by these garnishees, and the filing of a certain suit in this court numbered 39643, and entitled "C. J. Dick versus Compania General Anglo-Mexicana de Seguros, S. A.," in which suit there has been no actual service upon said defendant, but only constructive service by publication, and these garnishees are entitled to urge this proceeding any defenses that the said defendant might urge in said suit numbered 39643, and for such defenses these garnishees allege:

[fol. 46] That plaintiff and intervenor ought not to have or maintain said suit numbered 39643 against said defendant, or have or maintain this garnishment against these garnishees or either of them, because:

1. The policy of insurance mentioned in and declared upon by plaintiff's petition herein, and by the intervenor, contained a stipulation and provision reading as follows:

"It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs."

That said policy was issued in the Republic of Mexico, and that the above quoted provision thereof was and is valid and enforceable under the laws of the Republic of Mexico, and that said contract was performable and intended to be performed in Mexico, and the clause above quoted is and was valid as a defense to any suit brought to recover on said policy after the expiration of one year from the date of the accrual of the cause of action or damage to the vessel mentioned in plaintiff's petition; that this suit was not filed within one year, from and after the accrual of said cause of action, and these garnishees here now specially plead said facts and the said provision and stipulation of said policy in bar of plaintiff's cause of action herein asserted against them and in bar of the plaintiff's cause of action asserted in said suit numbered 39643.

2. The contract sued on by plaintiff in said suit numbered 39643 was made in the Republic of Mexico, and intended to be performed in the Republic of Mexico, and was subject to the laws of the said Republic of Mexico, which contain certain provisions in Article- 1038, 1039 and 1043, [fol. 47] of the Commercial Code of the Republic of Mexico, and which was in force at the time of the issuance of said policy, and at the time of the accrual of plaintiff's cause of action herein, and which read as follows:

Article 1038. "The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code."

Article 1039. "The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against same is given."

Article 1043. "One year shall prescribe actions derived from contracts of life insurance, sea and land."

That under and by virtue of the above quoted provisions of the Mexican laws, any cause of action such as that as-

serted by plaintiff herein is and was barred if no suit was instituted thereon within one year from the date of the accrual thereof, and these garnishees here now specially plead that no suit was instituted on said policy against the said defendant within such one-year period, and plead such fact and the fact that said suit numbered 36943 was not instituted within said one-year period, nor were the garnishments in this proceeding sued out within one year from the accrual of the cause of action, and plead the provisions of said commercial code of the Republic of Mexico in bar of these garnishments, and of said suit numbered 39643, and pray that they may be hence dismissed.

3. These garnishees further specially plead that the policy declared on by plaintiff in said cause numbered 39643 was void from its inception because it was then represented to the defendant that the value of the vessel alleged to have been insured thereby was in excess of the amount of such policy and these garnishees allege that in fact said representations of plaintiff were not true, and the value of said vessel was not as much as the amount of said policy.

[fol. 48] 4. These garnishees allege that said vessel was not a total loss, and that notwithstanding such fact, the said vessel was abandoned by plaintiff without notice to the defendant in violation of the terms of the policy, and that it was the duty of plaintiff, under the terms of said policy to repair said vessel at the cost and expense of defendant, and defendant is liable, if at all, only for the cost of such repairs, and not for the face of such policy.

Terry, Cavin & Mills, Attorneys for Garnishees.

[File endorsement omitted.]

In District Court of Galveston County

[Titles omitted]

Plaintiff's General Demurrer—Filed Jan. 14, 1927

Now comes the plaintiff C. J. Dick, in the above entitled and numbered causes and demurs generally to the

answer of the defendant and the garnishees herein and says that said answers show no defense to his cause of action and prays judgment of the Court.

Further and specially demurring herein, plaintiff says that that part of the answer of the defendant and the garnishees which undertakes to set up a contractual limitation and which undertakes to set up the limitation of the Republic of Mexico fail to show any defense to the cause of [fol. 49] action herein and should be stricken out:

(a) Because the portions alleged in said answer as being contained in said policy do not form a portion of the cause of action.

(b) Because the statute of the State of Texas prohibits a contractual limitation of less than two years.

(c) Because said matters are in violation of the public policy of the State of Texas and void in this Court.

Wherefore plaintiff prays that said parts of the answer be stricken out and held for naught.

Not waiving the foregoing demurrers, but relying thereon, this plaintiff denies all and singular the allegations in the answer of the above named defendant and garnishees contained.

H. C. Hughes, Williams, Neethe & Williams, Attys.
for Plaintiff & Intervenor.

[File endorsement omitted.]

In District Court of Galveston County

No. 39645

C. J. Dick

vs.

The Home Insurance Co. & The Franklin Fire Insurance Co., Garnishees of Compania General Anglo-Mexicana de Seguros, S. A.

Judgment, Notice of Appeal, etc.—July 26, 1927

On this the 26th day of July, 1927, came on to be heard the above entitled and numbered cause and there appeared

the plaintiff herein C. J. Dick in person and by his attorneys and the intervenors Texas & Gulf Steamship Company, a corporation, and Suderman & Young, Inc., both by their attorneys, and there also appeared The Home Insurance Company and the Franklin Fire Insurance Com-[fol. 50] pany, garnishees, by their attorneys, and all the parties hereto having agreed to submit the matters in controversy between them, both of law and of fact, to the Court for determination, and the Court having heard the pleadings including the answers of the said garnishees and the controverting affidavits filed to said answers and all of the testimony herein; and it appearing to the Court that writs of garnishment were heretofore duly issued herein as an ancillary remedy in connection with cause No. 39,643, entitled C. J. Dick vs. Compania General Anglo-Mexicana de Seguros, S. A. and that in said cause the plaintiff herein is allowed to recover the sum of Seventeen Thousand Five Hundred and Eighty-seven and 50/100 Dollars ($17,587.50) and the intervenors are allowed to recover the sum of Nineteen Thousand and Eigthy-seven Dollars and 50/100 Dollars ($19,087.50) and it appearing to the Court that the said garnishee, The Home Insurance Company is indebted to the Compania General Anglo-Mexicana de Seguros, S. A. in the sum of Eighteen Thousand Three Hundred and Thirty-seven and 50/100 Dollars ($18,337.50); and it further appearing to the Court that the garnishee the Franklin Fire Insurance Company is indebted to Compania General Anglo-Mexicana de Seguros, S. A. in the sum of Eighteen Thousand Three Hundred and Thirty-seven and 50/100 Dollars; it is therefore ordered, adjudged and decreed that the plaintiff and the intervenors herein recover from said garnishee The Home Insurance Company, a corporation, the said amount of $18,337.50, and that the plaintiff and the intervenors recover from said garnishee Franklin Fire Insurance Company, a corporation, the said amount of $18,337.50, together with interest on said sums from this date at the rate of six per cent (6%) per annum and all costs in this behalf incurred, said amounts so recovered against the said garnishees to be apportioned and prorated between the plaintiff and intervenors herein on the basis of the recoveries had by them against the said Compania [fol. 51] General Anglo-Mexicana de Seguros, S. A. in cause No. 39,643, and which amounts so recovered when

paid by said garnishees shall be in full satisfaction of the judgments rendered herein against the said garnishees. To which judgment, order and decree the garnishees, The Home Insurance Company and the Franklin Fire Insurance Company, duly excepted and in open court gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, and ninety (90) days from and after the adjournment of this Court are allowed said garnishes for the filing of statement of facts and bills of exception herein.

IN DISTRICT COURT OF GALVESTON COUNTY

[Titles omitted]

FINDINGS OF FACT & CONCLUSIONS OF LAW—Filed July 26, 1927

Findings of Fact

I

I find that on the 18th day of March, 1921, the defendant, the Compania General Anglo-Mexicana de Seguros, S. A., issued its policy No. 18098 to Charles B. Bonner of Tampico, Mexico, wherein said company insured the tug R. Waverly also known as Waverly R, for a period of one year from the last named date, for the sum of Thirty-five Thousand ($35,000.00) Dollars, the loss or damage under said policy being payable to the Texas & Gulf Steamship Company and C. J. Dick, as their respective interests might [fol. 52] appear; and that the defendant received from the parties interested the full amount of premium demanded for the issuance of said policy.

II

I find that on May 24, 1921, all the right of Charles B. Bonner, in said policy was transferred to A. W. Turner, and that on July 18, 1921, all the rights of A. W. Turner in said policy were transferred to and solely vested in the plaintiff, C. J. Dick.

III

I find that the plaintiff, C. J. Dick, had a beneficial and insurable interest in said vessel, and that said policy hereinabove described, as originally issued was for the benefit of the plaintiff, C. J. Dick, and the Texas & Gulf Steamship Company, according to the respective interests of said parties in said vessel. That thereafter Suderman & Young duly acquired an interest in said policy or the proceeds thereof.

IV

I find that while said policy was in full force and effect, and on the 27th day of July, 1921, the vessel insured under the policy hereinabove described, took fire and was burned and sunk in the harbor of Tampico, Mexico, and thereby became and was a total loss, said facts being made known to the insurance company by the proof of total loss required by the policy.

V

I find that on the 29th day of March, 1921, the duly authorized agents of the Home Insurance Company and the Franklin Fire Insurance Company in Mexico City issued notices to said companies that each of them was bound for re-insurance in the sum of Fifteen Thousand ($15,000.00) Dollars under the policy No. 189098, and that said notices of re-insurance and the premiums for same were accepted and acted upon by The Home Insurance Company and the Franklin Fire Insurance Company.

[fol. 53] VI

I also find that the plaintiff and intervenors have demanded payment of the defendant, and that no payment has ever been made.

VII

I find that C. J. Dick, the plaintiff, left Mexico where he was temporarily sojourning, within about ten days after the total loss of the R. Waverly, and that he has never at any time been a permanent resident of the Republic of Mexico,

but that he has at all times been a resident citizen of the State of Texas.

VIII

I find that garnishments were issued in cause No. 39645 and that there is now in the hands of each of the garnishees The Home Insurance Company and the Franklin Fire Insurance Company Fifteen Thousand ($15,000.00) Dollars, making a total sum of Thirty Thousand ($30,000.00) Dollars belonging and due to the original defendant, Compania General Anglo-Mexicana de Seguros, S. A. in the hands of said garnishees, together with interest on said sum from December 3, 1923, on which date the garnishees filed their answers in garnishment wherein they denied that they were indebted to the original defendant, Compania General Anglo-Mexicana de Seguros, S. A.

Conclusions of Law

I

I conclude as a matter of law that by reason of the policy and the total loss of said vessel, and the proof of same, the plaintiff and those entitled thereto in connection with the plaintiff should have judgment for the amount of money brought within the jurisdiction of this Court by garnishments issued in cause No. 39,645.

[fols. 54-60]

II

I further conclude that the plaintiff and the intervenors, they having agreed among themselves as to the amounts due between them, should have judgment against the garnishees for the sum sequestered by garnishment, and which said sum is found to be due from the garnishees to the original defendant.

To which findings of fact and conclusions of law the defendant and garnishees except.

Dated at Galveston, Texas, July 26th, 1927.

C. G. Dibrell, Judge.

[File endorsement omitted.]

Home Insurance Co. bond on appeal for $40,000, approved and filed August 11, 1927, omitted in printing.

[fols. 61-68] Franklin Fire Ins. Co. bond on appeal for $40,000, approved and filed August 11, 1927, omitted in printing.

[fol. 69] In District Court of Galveston County

No. 39645

[Title omitted]

Garnishees' Assignments of Error—Filed Nov. 7, 1927

Now come garnishees in the above numbered and entitled cause and file the following as their assignments of error, and respectfully show to the Court that the trial Court committed error in the following particulars:

1

The Court erred in sustaining the demurrer and exception of the plaintiff to so much of the answer of garnishees to plaintiff's controverting plea as pleaded the provision of the policy issued by Compania General Anglo-Mexicana de Seguros, S. A. reading as follows:

"It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under the policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs."

2

The Court erred in sustaining the demurrer of the plaintiff to so much of these garnishees' answer to plaintiff's controverting plea as pleaded the provisions of Articles 1038, 1039 and 1043 of the Commercial Code of the Republic of Mexico.

3

The Court erred in its fourth findings of fact reading as follows:

"I find that while said policy was in full force and effect on the 27th day of March, 1921, the vessel insured under the policy hereinabove described took fire and was burned and sunk in the harbor of Tampico, Mexico, and thereby became and was a total loss, said facts being made known to [fol. 70] the Insurance Company by the proof of total loss required by the policy,"

because the undisputed evidence shows that the said vessel was not a total loss within the meaning of the policy.

4

The Court erred in its eighth finding of fact, reading as follows:

"I find that garnishments were issued in cause No. 39645 and that there is now in the hands of each of the garnishees, the Home Insurance Company and the Franklin Fire Insurance Company, $15,000.00, making a total sum of $30,000.00 belonging and due to the original defendant, Compania General Anglo-Mexicana de Seguros, S. A. in the hands of said garnishees, together with interest on said sum from December 3, 1923, on which date the garnishees filed their answers in garnishment, wherein they denied that they were indebted to the original defendant, Compania General Anglo-Mexicana de Seguros, S. A.,"

because under the terms of the agreements between the Home Insurance Company and the Franklin Fire Insurance Company and the Compania General Anglo-Mexicana de Seguros, S. A., the said Home Insurance Company and Franklin Fire Insurance Company were merely indemnitors of said Compania General Anglo-Mexicana de Seguros, S. A. and no sum was due from them to said Compania General Anglo-Mexicana de Seguros, S. A., or did they have any sum in their hands belonging to it at the time of the filing of their answers in garnishment herein.

5

The Court erred in its first conclusion of law, which is as follows:

"I conclude as a matter of law that by reason of the policy and the total loss of said vessel and the proof of same, the plaintiff and those entitled thereto in connection with [fol. 71] the plaintiff should have judgment for the amount of money brought within the jurisdiction of this Court by garnishments issued in cause No. 39645,"

because the undisputed evidence shows that the vessel was not a total loss and that plaintiff is not entitled to recover under the terms of the policy.

6

The Court erred in its second conclusion of law, reading as follows:

"I further conclude that the plaintiff and the intervenors, they having agreed among themselves as to the amounts due between them, should have judgment against the garnishees for the sum sequestered by garnishment and which said *said* sum is found to be due from the garnishees to the original defendant,"

because the undisputed facts show that plaintiff is not entitled to judgment in this cause against either the original defendant or the garnishees.

7

The Court erred in rendering judgment in favor of plaintiff against these garnishees, because the Court had no jurisdiction to render such judgment, in that the only jurisdiction obtained by the Court over the original defendant, Compania General Anglo-Mexicana de Seguros, S. A. was by citation by publication and by garnishment sued out against these garnishees under alleged reinsurance agreements and said reinsurance agreements and the facts show that these garnishees were merely indemnitors of the original defendant, and that there is no liability on the part of these garnishees to the original defendant until and unless

a valid judgment should be rendered against said original defendant, and, therefore, these garnishees were not subject to garnishment and the original defendant was not subject to the jurisdiction of the Court.

[fols. 72-90] 8

The Court erred in rendering judgment in favor of plaintiff against these garnishees, because any cause of action which plaintiff had against the original defendant, Compania General Anglo-Mexicana de Seguros, S. A. was barred by the provisions of the Mexican Commercial Code applicable to the suit of the plaintiff against said original defendant.

9

The Court erred in rendering judgment against these garnishees, because the cause of action asserted by plaintiff against the original defendant, Compania General Anglo-Mexicana de Seguros, S. A. could not be maintained because of the provisions of the policy issued by the said original defendant, Compania General Anglo-Mexicana de Seguros, S. A. sued on by plaintiff, no suit having been instituted thereon within one year from the date of the loss of the vessel.

10

The Court erred in rendering judgment in favor of plaintiff against these garnishees, because no liability on the part of the original defendant, Compania General Anglo-Mexicana de Seguros, S. A. to plaintiff on the policy sued on by plaintiff against said original defendant was shown to exist under the evidence, in that the vessel was not shown to have been a total loss.

Wherefore these defendants pray that the judgment may be reversed.

Terry, Cavin & Mills, Attorneys for Defendant.

[File endorsement omitted.]

[fols. 91-93] IN DISTRICT COURT OF GALVESTON COUNTY

Statement of Facts

EXHIBIT 1

Compania General Anglo-Mexicana De Seguros, S. A., Mexico. Agentes Generales: Wm. B. Woodrow Co., S. A. la. Bolivar 18. Apartado 506, Mexico, D. F. Seguro Sobre Embaracaciones. Poliza No. 18098 Nombre Chas. B. Bonner, Tampico, Tamps. Desde 18 de Marzo, de 1921 Hasta 18 de Marzo de 1922. Premio y gastos $3,248.50. Moneda Americana. Sirvase Vd. tener la bonded de examinar esta Poliza y sus condiciones, porque si no se da cumplimeiento a las mismas, la Compania no sera responsable.

* * * * * * *

[fol. 94] EXHIBIT TO STIPULATION

(The original policy, being in Spanish, is hereinafter attached, marked "Exhibit No. —.")

(Policy)

Translation

From March 18th, 1921, to March 18th, 1922

Premium & Expenses: Premium, $3,150.00; Policy, .50; Tax, 94.50; Stamps, 3.30—Total, $3,248.50, U. S. Currency, —.

Compania General Anglo-Mexicana De Seguros, S. A.

Capital & Reserve Over $500,000

Policy Number: 18098

[fol. 95] This Company operates in combination with Powerful Foreign Insurance Societies.

General Offices: First Bolivar Street, No. 18, Mexico City.

General Agents: Wm. B. Woodrow Co., S. A., Mexico City.

* * * * * * *

La Compania General Anglo-Mexicana de Seguros, S. A., Mexico D. F. (The General Anglo-Mexican Insurance Company, Ltd., of Mexico), for account of Mr. Chas. B. Bonner of Tampico, Tamps.—Losses, in case there be any, shall be payable in the City of Mexico in current funds of the United States of Mexico, or their equivalent elsewhere, to himself or to his order—

Do assure, and he is hereby assured, losses or no losses, up to an amount of thirty-five thousand dollars, American money, from the eighteenth day of March, 1921, until the eighteenth day of March, 1922, said assurance commencing and terminating at twelve, noon, Tampico time.

This agreement subject to the following conditions: This Assurance is limited, for its effects, to the Panuco and Tuxpam rivers, and to such interior waters as may communicate therewith, commonly used for the transportation of cargo and/or passengers, to and from the rivers, camps and places within the districts known as the Petroliferous (or oil) Regions of "Panuco" or "La Huasteca," Notwithstanding, permission is granted to tugs (tow-boats), and only such, to make coasting voyages or trips within the limits of Tampico, State of Tamulipas, and Tuxpam, State of Veracruz, with the option of touching at Port Lobos and its environs, but never to go outside a limit of five nautical miles from the co-st, in consideration of the payment of an additional premium of — for each round trip, [fol. 96] the Assured obligating himself, on his part, to give written advice to the Assuring Company, of each intended voyage, in advance of, or simultaneously with, the departure of the vessel.

It is understood and agreed that the Assuring Company shall be considered free of all responsibility for any loss that may be occasioned by possession, despoiling, expropriation or secuestration ordered or imposed by Constistuted Authorities, Federal or Local, on the hull, rigging, equipment, provisions, artillerty, ammunition, boats, and

other accessories and machinery of the tug "Waverly R.," detailed description of which is in the possession of this Company, or whatever be the name or names under which this vessel be known, now or in future, the Company's responsibility commencing, as stated, and continuing without interruption during the stated period of time, according to the exigencies of its service, in port or at sea, in docks, or dockyards, under way, dykes, or bridges, at all times, places or occasions, whatever, or whatever the service or traffic, permitting navigation by steam or by sail, with or without pilots, towing or being towed, lending assistance to ships and/or vessels in all situations and in any condition, and trial trips, with liberty to discharge, interchange or to take on board merchandise, money, passengers or provisions wherever the vessel may touch, and to conduct merchandise, cattle on foot, etc., above or below board, including the risks of entry and leaving docks, turning-basins and port movements, and entrance to or leaving [fol. 97] careenages, in as many times as may be necessary, during the term of this Policy.

Said vessel, etcetera, inasfar as the Assured is concerned, and by agreement entered into between the Assured and the Assuring Company, is valued and shall be valued, for the effects of this assurance, as follows:

Hull, rigging, equipment, accessories, etc	$15,000.00
Machinery, etc., and all pertaining thereto	15,000.00
	$30,000.00, U.S. Cy.

The winch-boilers, winches, capstans, steering-gear, etc., and apparatus of electric lighting shall be considered as forming part of the hull, and not of the machinery.

There shall be excluded from the assurance the refrigerating machinery and the insulating system of same, unless expressly included in this policy, or unless they shall likewise belong to the owners of the vessel.

The assuring company shall receive, as premium on this policy, the sum of three thousand one hundred and fifty dollars, U. S. Cy., calculated at the rate of nine per cent.

The risks and dangers for which we, the said Assurors, are willing to hold ourselves responsible, and which responsibility we assure, are those of sea, waters, fire, robbery

of the captian, mate or crew, explosions which may cause loss or damage to the property herein assured, and other risks, dangers or disasters arising from sea or earth which may result or cause deterioration, detriment or damage to said vessel, etc., or any of its parts. And in the event of any loss, or damage, it shall be legal and obligatory on [fol. 98] the part of the Assured or his assigns, to appear, either personally or by means of his representatives or employees, before the competent authorities or tribunals, or to take such extrajudicial action, make voyages or trips or in the defence, safeguarding or recuperation of said vessel or any of its parts without prejudice to this Assurance, the assurors contributing to the expenses thereby incurred, in proportion to the sum herein assured, and it is expressly declared and agreed that no act on the part of either the Assured or the Assurors, undertaken for the recuperation, salvaging or conservation of the property assured, shall be considered as a renouncement of rights or acceptance of abandon.

This Assurance shall be free from grounding on bars or mud banks, any such grounding shall not be considered as going ashore within the terms and conditions of this Policy.

This Assurance being for specific loss and/or damage to the assured vessel, or any of its parts, it shall not be considered as a guarantee of the responsibility of a third party of any character whatsoever.

It is further understood and agreed that, in the event of salvage, towage or other help given to the vessel assured under this policy, by any other vessel, whether it belong to the same owners in whole or in part, the value of such services (without taking into consideration the common ownership of the vessels, if such there be) shall be determined by arbitration, and the amount specified in such decision insofar as the interests herein assured are concerned, shall constitute a charge on this policy.

In the event of claim for loss or damage on vessels constructed of wood, there shall be deducted from the cost of the metal, or caulking under the metal and of putting into dock, first the value of the old metal and of its nail- [fol. 99] ing, and then, of the rest, two and one-half per cent (2½%) for each month that the metal may have

been on the vessel at the time of removing it, and if said metal has been on three years, then the total value of same shall be for account of the Assured. On vessels which are not metal bottomed, there shall be deducted from the cost of caulking the bottom as far up as the minimum floating line, and the docking charge for that purpose, two per cent (2%) for each and every month since the vessel's last caulking date, and there shall be deducted from the cost of cleaning and painting the bottom, and of dry-docking for that purpose, one-twelfth (1/12th) for each and every month since the vessel was last cleaned, and from the cost of any cleaning or caulking there shall be deducted twenty-five per cent (25%) for each complete year of use, and from all other repairs, excepting those made to the anchors, there shall be deducted one-third (⅓) on vessels older than two months, counted as from their date of registry. Notwithstanding, on vessels constructed of steel, the deduction of one-third shall not be made on the iron or steel work of the hull, masts or rigging, but the foregoing deductions will be made in the painting and other charges.

Notwithstanding any stipulation to the contrary which may appear in this policy, this Assurance is guaranteed to be free from Particular Average, unless caused by grounding (going ashore), sinking, fire or collision; and on all claims on internal combustion engines or machinery, there shall be deducted ten per cent (10%) of the amount herein fixed as the value of the machinery.

Free of Gross Average and any other claim or expense, excepting salvage, which may arise from interruption, discomposition, or disarrangement of the machinery.

[fol. 100] Losses and expenses of salvage shall be paid in accordance with the York-Antwerp rules, and these shall be assessed by the Assurors. Nothing, however, in this paragraph shall annul or modify in any manner, the preceding paragraph.

Subject moreover, in any event, to the following contributing value clause:

In cases where the Assured is responsible for, or has paid any contribution to the Gross Average, and the contributing value be greater than the assured value, the amount collectible by reason of indemnity under this policy, shall only be in proportion to the contributing value over the assured

value, and when the contributing value has been reduced by Particular Average, for which the Assurors may be liable, the sum which corresponds to this Policy by way of indemnification of Particular Average shall be deducted from the assured sum, so that in this manner may be fixed the proportional part of contribution for which the assurers are liable. The amount of the liability of the Assurors, thru salvage, shall be computed in the same manner. The maximum of the Assurors liability shall, in no case, exceed the amount of this policy, during the term of same.

In no case shall the Assurors be liable for unrepaired damages in addition to subsequent total loss suffered during the term of this policy.

There shall be no claim, under this policy, for estimated total loss, unless the cost of salvage and repair exceed the amount assured.

In order to determine whether the vessel is an estimated total loss, the assured value shall be considered the repaired value and there shall not be taken into account the amount of the damages or the value that the vessel or its carts may have as junk or used material.

[fol. 101] In the event of total loss or estimated total loss, no claim shall be made by the Assurors for freights or towage, whether or no formal advice is given of abandonment.

On the expiration of this policy, if the vessel be at sea, or in distress, or in port, either thru distress or in port of call, it shall remain covered on condition that previous and written advice is given to the assurors, and by payment of the first month's premium calculated pro-rata, until its arrival at its destination.

If, by mutual agreement, this policy is cancelled, there shall be returned — per cent (—%) for each thirty days of the unexpired term.

The Assured agrees that, should he fail to pay the premium within thirty days of the commencement of this policy, same shall be cancelled, and without any advice.

In the event of accident, which may cause claim for loss or damage under this present policy, written advice must be given the Assurors, before any expert examination is undertaken, so that they, the Assurors, may nominate their own Surveyor, should they so desire, and so that the amount of the damage may be determined, the Assurors may so-

licit, or require that the assured solicits, bids on the repair of said damage.

It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year, counted as from the date on which such damage occurs.

This assurance is held free of all claim for capture, imprisonment, arrest, restriction or detention of the vessel assured and the consequences of such acts and the results of same (except piratry), as also on account of all consequence of hostilities or warlike operations, carried out either before or after declaration of war.

[fol. 102] A strict condition of the present contract is that the Assuring Company is considered exempt from all responsibility for l-ss occasioned thru strike, general stoppages, or other workman's disorders mutiny or civil strife.

It is further understood and agreed that if the interests of the assured and herein assured are sold or transferred, then, and except the assuring company gives its written consent to such sale or transfer, this Policy shall by that act become cancelled as from the date of such sale or transfer, unless the vessel has cargo on board or has already left the loading port, or is at sea, in ballast; in any of such cases the cancellation shall be suspended until the arrival of the vessel in port of final discharge, if she be loaded, or to the port of destination, if she be in ballast.

It is understood and agreed that there shall be no cause for claim, neither shall claim be made, based on the loss or frustration of voyages or trips in project, on account of detainment, imprisonment, restriction or arrest of the vessel, ordered or imposed by the Constituted Authorities, Federal or local, or by reason of popular insurrection or revolution, or ordered or imposed by foreign governments or their agents, outside the jurisdictional waters of the Republic.

The present policy is subjected to the dispositions of the Commercial Code, in that it does not alter or modify the stipulations which that same contains.

It is agreed that any loss or damage ascertained and proven to be due to the Assured under this Policy shall be held payable to the Texas Gulf Steamship Co. of Galveston,

Texas, and C. J. Dick, as their respective interests may appear.

[fol. 103] In witness whereof the Company has issued the present policy duly signed by its Directors.

Mexico, on the 30th day of March, 1921.

Translator's Note

I hereby certify that the foregoing is a true and faithful translation of the original, written in the Spanish Language, executed to the best of my skill and ability, this twenty-ninth day of June, 1926.

Galveston, Texas, U. S. A.

(Signed) A. Mostyn Lloyd, Public Translator.

Endorsement No. 190 to attach to and form part of Policy No. 18098, issued by the Compania General Anglo-Mexicana de Seguros, S. A., in favor of Mr. Chas. B. Bonner of Tampico, Tampa.

It is hereby declared and agreed that as from May 14th, 1921, all the interests, rights and obligations of the above mentioned policy, are transferred to and solely vested in Mr. A. W. Turner as Lessee of the Insured Craft.

The Loss Payable Clause as mentioned on text of Policy remains unchanged.

Noted in this Company's Registers.

Mexico, D. F., May 24th, 1921.

Consejero.

Endorsement No. 205 to attach to and form part of Policy No. 18098, issued by the Compania General Anglo-Mexicana De Seguros, S. A., in favour of Mr. A. W. Turner, of Tampico, Tamps.

[fol. 104] It is hereby declared and agreed that that as from July 12th, 1921, all the interests, rights and obligations of the above mentioned Policy, are transferred to and solely vested in Mr. C. J. Dick as Lessee of the Insured Craft.

The Loss Payable Clause as mentioned on text of Policy remains unchanged.

Noted in this Company's Registers.

Mexico, D. F., July 18th, 1921.

Consejero.

Wm. B. Woodrow Co., S. A., Underwriters and Adjusters, Mexico, D. F.

La. Bolivar 18, Apartado 506

Inland Water Craft-Hulls

Declaration No. 6

Mexico, 29th March, 1921.

The Home Insurance Company, N. Y.:

Please be advised that we have bound reinsurance as follows:

$15,000., U. S. Cy. (part of $35,000, U. S. Cy.), on "Waverly R.," Tug Boat, in favor of Chas. B. Bonner, Tampico.

Term: One year from 18th March, 1921, to 18th March, 1922.

Anglo-Mexicana Policy No. 18098. Item No. —. Rate, 9%. Premium, $1,350.00, U. S. Cy.

Closed Bord. 2.

(Exhibit # 3.)

[fols. 105-175] Wm. B. Woodrow Co., S. A., Underwriters and Adjusters, Mexico, D. F.

La. Bolivar 18, Apartado 506

Inland Water Craft—Hulls

Declaration No. 180

Mexico, 29th March, 1921.

Franklin Fire Insurance Company, New York:

Please be advised that we have bound reinsurance as follows:

$15,000, U. S. Cy. (part of $35,000, U. S. Cy.), on "Waverly R," Tug Boat, in favour of Chas. B. Bonner, Tampico.

Term: One year from 18th March, 1921, to 18th March, 1922.

Anglo-Mexicana Policy No. 18098. Item No. —. Rate, 9%. Premium, $1,350.00, U. S. Cy.

Closed Bord. 5.

(Exhibit #4.)

Home Insurance

Bordereau No. 2

Inland Water Craft (Hulls)

From Wm. B. Woodrow Co., S. A., Mexico

Consec. No.	Policy No.	Item No.	Name of insured	Description of craft	Sum insured	Sum reinsured	Term of reinsurance From	Term of reinsurance To	Rate %	Reinsurance premium
					U.S.Cy.	U.S.Cy.				U.S.Cy.
2	C/N 3035	..	Marimon Mexican Oil Cpn.	"Fallie," Stern Wheeler.....	$35,000	$15,000	4 3 1921	15 3 1921	9pa	$40.68
3	18085	..	do.	"J. Marimon," Stern Wheeler.	35,000	15,000	4 3 1921	4 3 1922	9	1,350.00
4	18089	1	New England Fuel Oil Co.	"No. 12," Deck Barge.....	14,000	.....	16 3 1921	16 3 1922	3½	490.00
5	18089	2	do.	& by another Policy.....	21,000	14,000	16 3 1921	16 3 1922	3½	490.00
6	18098	..	Chas. B. Bonner.	"No. 13," Deck Barge.....	14,000	.....				
7	18099	1	Marimon Mexican Oil Cpn.	& by another Policy.....	21,000	14,000				
8	18099	2	do.	"Waverly R," Tug.....	35,000	15,000	18 3 1921	18 3 1922	9	1,350.00
				"M M O. C ⁄ 10," Deck Barge.	35,000	15,000	23 3 1921	23 3 1922	3½	525.00
9	18102	..	Cfa. Transporte de Chapopote, S. A.	"M M O. C ⁄ 20," Deck Barge.	35,000	15,000	23 3 1921	23 3 1922	3½	525.00
				"Major Slack," Stern Wheeler.	35,000	15,000	30 3 1921	30 3 1922	9	1,350.00
				Totals	$238,000	$118,000				$6,120.68 U. S. Cy.

Remraks: ——.

Date: 31st March, 1921.

J. L.

[fol. 176] In Court of Civil Appeals of Texas

No. 9157

The Home Insurance Co. et al., Appellant,

vs.

C. J. Dick et al., Appellee-

From Galveston County

Judgment—April 19, 1928

"This cause came on to be heard on the transcript of the record and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellees, C. J. Dick, Texas & Gulf Steamship Company and Suderman & Young, Inc., recover of the appellant, The Home Insurance Company, and its surety, Globe Indemnity Company, and the appellant, The Franklin Fire Insurance Company, and its surety, Globe Indemnity Company, the sum or sums adjudged to them or each of them by the judgment of the Court below and all costs in this cause incurred, and this decision be certified below for observance."

[fol. 177] In Court of Civil Appeals of Texas

No. 9156

Compania General Anglo-Mexicana de Seguros, S. A., Appellant,

vs.

C. J. Dick et al., Appellee-

From Galveston County

Judgment—April 19, 1928

"This cause came on to heard on the transcript of the record and the same being inspected, because it is the opin-

ion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellant Compania General Anglo Mexicana de Seguros S. A., and its surety, Globe Indemnity Company, pay all costs incurred by reason of this appeal and all such costs as were adjudged against the said appellant in said cause by the trial court. It is further ordered that this decision be certified below for observance."

[fol. 178] IN COURT OF CIVIL APPEALS OF TEXAS

No. 9157

THE HOME INSURANCE COMPANY ET AL., Garnishees, Appellants,

vs.

C. J. DICK, Appellee

No. 9156

COMPANIA GENERAL ANGLO-MEXICANA DE SEGUROS, S. A., Appellants,

vs.

C. J. DICK, Appellee

Appeal from the District Court of Galveston County

OPINION—Filed May 3, 1928; in Supreme Court June 29, 1928

A statement in these causes, which have been submitted and considered as one, acquiesced in by the appellees as being correct, is thus taken in full from the brief for appellants:

"C. J. Dick filed suit in the district court of Galveston County against Compania General Anglo-Mexicana De Seguros, S. A. (which will hereafter be called for brevity sake, 'the Mexican Insurance Company'), to recover $35,000 on a policy of insurance issued by the Mexican Insur-

ance Company on the tug 'R. Waverly', alleging that the vessel had caught on fire in Tampico, Mexico, and became a total loss, and that thereby the policy matured for the face thereof. The Mexican Insurance Company was a corporation incorporated under the laws of Mexico and had no agent in this State. Appellee, Dick, sued out ancillary writs of garnishment against the Home Insurance Company and The Franklin Fire Insurance Company, as Garnishees of the Mexican Insurance Company. The Home Insurance Company and The Franklin Fire Insurance Company will hereafter be designated 'The American Insurance Companies.' The affidavit for garnishment was in statutory form.

[fol. 179] In as much as many of the questions presented in these appeals are common to both the Mexican Insurance Company and the American Insurance Companies, this brief will be presented for all of them, with such additional portions as may be applicable to the Garnishees alone.

The Texas & Gulf Steamship Company and Suderman & Young were allowed to intervene in the suits. The American Insurance Companies, as Garnishees, answered, denying any indebtedness to the Mexican Insurance Company. The plaintiff filed a controverting affidavit alleging that each of the American Insurance Companies was indebted to the Mexican Insurance Company in the sum of $15,000.00, on the ground that shortly after the issuance of the policy by the Mexican Company it had reinsured its obligation assumed thereby with each of the American Companies to the extent of $15,000.00, and that hence each of the American Insurance Companies was indebted to the Mexican Insurance Company in that amount.

The Garnishees answered the controverting affidavit as follows:

That it is not true that by reason of the contract of reinsurance existing between these garnishees and the defendant herein, there became due and payable from the garnishees to said defendant the sum of Fifteen Thousand and 00/100 ($15,000.00) Dollars from each of these garnishees; but that to the contrary, the liability of these garnishees to said defendant is solely to indemnify it against any loss or judgment that it might have to pay upon said policy of insurance; that it is not true that these

garnishees each have in their possession the sum of Fifteen Thousand and 00/100 Dollars ($15,000.00) belonging to the defendant, Compania General Anglo-Mexicana de Seguros, S. A.

[fol. 180] These garnishees further respectively show to the court that the only manner in which it is claimed that this court has jurisdiction over the defendant is by these garnishees, and the filing of a certain suit in this court numbered 39643, and entitled 'C. J. Dick versus Compania General Anglo-Mexicana de Seguros, S. A.' in which suit there has been no actual service upon said defendant, but only constructive service by publication, and these garnishees are entitled to urge in this proceeding any defense that the said defendant might urge in said suit numbered 39643, and for such defense these garnishees allege:

That plaintiff and intervener ought not to have or maintain said suit numbered 39643 against said defendant, or have or maintain this garnishment against these garnishees or either of them, because:

1. The policy of insurance mentioned in and declared upon by plaintiff's petition herein, and by the intervener, contained a stipulation and provision reading as follows:

'It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs.'

That said policy was issued in the Republic of Mexico, and that the above quoted provision thereof was and is valid and enforceable under the laws of the Republic of Mexico, and that said contract was performable and intended to be performed in Mexico, and the clause above quoted is and was void as a defense to any suit brought to recover on said policy after the expiration of one year from the date of the accrual of the cause of action or damage to the vessel mentioned in plaintiff's petition; that this suit was filed within one year from and after the accrual [fol. 181] of said cause of action, and these garnishees here now specially plead said facts and the said provision and stipulation of said policy in bar of plaintiff's cause of action herein asserted against them and in bar of the plaintiff's cause of action asserted in said suit numbered 39643.

2. The contract sued on by plaintiff in said suit numbered 39643 was made in the Republic of Mexico, and intended to be performed in the Republic of Mexico, and was subject to the laws of the said Republic of Mexico, which contain certain provisions in Articles 1038, 1039, and 1043 of the Commercial Code of the Republic of Mexico, and which was in force at the time of the issuance of said policy, and at the time of the accrual of plaintiff's cause of action herein, and which read as follows:

Article 1038. 'The right of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code.'

Article 1039. 'The periods fixed for the enforcement of rights of action acrising out of commercial acts shall be fatal except restitution against same is given.'

Article 1043. 'One year shall prescribe actions derived from contracts of life insurance, sea and land.'

That under and by virtue of the above quoted provisions of the Mexican law any cause of action such as that asserted by plaintiff herein is and was barred if no suit was instituted thereon within one year from the date of the accrual thereof, and these garnishees here now specially plead that no suit was instituted on said policy against the said defendant within such one-year period, and plead such fact and the fact that said suit numbered 39643 was not instituted within said one-year period, nor were the garnishments in this proceeding sued out within one year from the accrual of the cause of action, and plead the provisions of [fol. 182] said commercial code of the Republic of Mexico in bar of these garnishments, and of said suit numbered 39643, and pray that they may be hence dismissed.

3. These garnishees further specially plead that the policy delared on by plaintiff in said cause numbered 39643 was void from its inception because it was then represented to the defendant that the value of the vessel alleged to have been insured thereby was in excess of the amount of such policy and these garnishees allege that in fact said representations of plaintiff were not true, and the value of said vessel was not as much as the amount of said policy. .

4. These garnishees allege that said vessel was not a total loss, and that notwithstanding such fact, the said ves-

sel was abandoned by plaintiff without notice to the defendant, in violation of the terms of the policy, and that it was the duty of plaintiff, under the terms of said policy to repair said vessel at the cost and expense of defendant, and defendant is liable, if at all, only for the cost of such repairs, and not for the face of such policy.

The defendant, Mexican Insurance Company, answered in the main suit by pleading the same provisions as to limitation under the Mexican Law, and the provisions of the contract and other defensive matters that were pleaded by the Garnishees, this answer being filed by attorneys appointed by the court to represent the Mexican Insurance Company, which had been cited by publication.

Appellee demurred to all of the allegations of the answers of the Mexican Insurance Company and the Garnishees, which set up contractual limitation and limitation under the laws of the Republic of Mexico. These demurrers were sustained by the court and judgment was rendered against the Mexican Insurance Company for $36,675.00 and against each of the American Insurance Companies, as Garnishees, for $18,337.50. The court filed findings of fact and co-
[fol. 183] clusions of law in both cases, as follows:

I

'I find that on the 18th day of March, 1921, the defendant, the Compania General Anglo-Mexicana de Segros, S. A., issued its policy No. 18098 to Charles B. Bonner of Tampico, Mexico, wherein said company insured the tug R. Waverly, also known as Waverly R, for a period of one year from the last named date, for the sum of Thirty-five thousand ($35,000.00) Dollars, the loss or damage under said policy being payable to the Texas & Gulf Steamship Company and C. J. Dick, as their respective interests might appear; and that the defendant received from the parties interested the full amount of premium demanded for the issuance of said policy.

II

I find that on May 24, 1921, all the right of Charles B. Bonner in said policy was transferred to A. W. Turner, and that on July 8, 1921, all the rights of A. W. Turner in

said policy were transferred to and solely vested in the plaintiff, C. J. Dick.

III

I find that the plaintiff, C. J. Dick, had a beneficial and insurable interest in said vessel, and that said policy hereinabove described, as originally issued was for the benefit of the plaintiff, C. J. Dick, and the Texas & Gulf Steamship Company, according to the respective interests of said parties in said vessel. That thereafter Suderman & Young duly acquired an interest in said policy or the proceeds thereof.

IV

I find that while said policy was in full force and effect, and on the 27th day day of July, 1921, the vessel insured under the policy hereinabove described, took fire and was [fol. 184] burned and sunk in the harbor of Tampico, Mexico, and thereby became and was a total loss, said facts being made known to the insurance company by the proof of total loss required by the policy.

V

I find that on the 29th day of March, 1921, the duly authorized agents of the Home Insurance Company and the Franklin Fire Insurance Company in Mexico City issued notices to said companies that each of them was bound for re-insurance in the sum of Fifteen Thousand ($15,000.00) Dollars under the policy No. 18098, and that said notices of re-insurance and the premiums for same were accepted and acted upon by The Home Insurance Company and the Franklin Fire Insurance Company.

VI

I also find that the plaintiff and interveners have demanded payment of the defendant, and that no payment has ever been made.

VII

I find that C. J. Dick, the plaintiff, left Mexico where he was temporarily sojourning, within about ten days after the total loss of the R. Waverly, and that he has never at any time been a permanent resident of the Republic of Mex-

ico, but that he has at all times been a resident citizen of the State of Texas.

VIII

I find that garnishments were issued in cause No. 39643 and that there is now in the hand of each of the garnishees, The Home Insurance Company and the Franklin Fire Insurance Company, Fifteen Thousand ($15,000.00) Dollars, making a total sum of Thirty Thousand ($30,000.00) Dollars belonging and due to the original defendant, Compania General Anglo-Mexicana de Seguros, S. A., in the hands of said garnishees, together with interest on said sum from December 3, 1923, on which date the garnishees filed their [fol. 185] answers in garnishment wherein they denied that they were indebted to the original defendant Compania General Anglo-Mexicana de Seguros, S. A.

Conclusions of Law

I

I conclude as a matter of law that by reason of the policy and the total loss of said vessel, and the proof of same, the plaintiff and those entitled thereto in connection with the plaintiff should have judgment for the amount of money brought within the jurisdiction of this court by garnishments issued in cause No. 39654.

II

I further conclude that the plaintiff and the interveners, they having agreed among themselves as to the amounts due between them, should have judgment against the garnishees for the sum sequestered by garnishment, and which said sum is found to be due from the garnishees to the original defendant."

The record discloses no action other than by implication on the appellees' demurrers, the judgments going in their favor of the several sums awarded, merely upon general recitations that the law and the facts were with them; joining in common cause, the Insurance Companies, both Mexican and American, assail them, in substance, upon these grounds:

1. The court erred in not sustaining the contractual provision in the main policy involved, which in effect adopted Article 1043 of the Commercial Code of Mexico having like effect, and expressly prohibited suit thereon unless it was brought within one year after the accrual of the cause of action, this provision being valid under the laws of Mexico where the contract was made, and this suit not having been filed within that period;

[fol. 186] 2. The Texas R. S. Article 5545 would violate the Constitution of the United States, Article 1, Section 10, as well as the Fourteenth Amendment thereto, as impairing the obligations of a contract against the appellees and depriving them of their property without due process of law, were it construed to be applicable to the contract sued upon in the main case here, which contained the one year limitation provision referred to;

3. "The court erred in holding that the vessel was a total loss, within the meaning of the policy, and, therefore, erred in holding that appellee was justified in abandoning her, because the facts were totally insufficient to show any such total loss";

4. The court erred in rendering the judgment, because the reinsurance agreements shown were contracts of indemnity only and not of liability.

We conclude that none of these contentions can be sustained. It is true that the policy was made in Mexico, was by its terms to be performed there, and further contained these provisions:

"It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs". * * *

"The present policy is subjected to the dispositions of the Commercial Code in that it does not alter or modify the stipulations which that same contains."

It is also true that Article 1043 of the Mexican Commercial Code thus referred to provided, "One year shall prescribe actions derived from contracts of life insurance, sea and land", and that this fire occurred July 27, 1921,

these suits on account thereof not having been filed until [fol. 187] October 27, 1923, two and one-fourth years later; but these facts did not require at the learned trial court's hands the enforcement of the Mexican one-year period of limitation, the public policy of Texas, as declared by statute and judicial decision, being the other way; R. S. Article 5545, Ry. v. Hambrick, 97 S. W. 1072; Ry. v. Brice, 110 S. W. 529; Ry. v. Dysart, 130 S. W. 1047, writ of error refused; see also decisions of other American courts in Galliher v. Ins. Co., 150 Ala. 543; 124 Am. St. Rep. 83; Smith v. Association, 112 Va. 192, 70 S. E. 482, 38 L. R. A. (N S) 1019, Campbell v. City, 155 U. S. 283, 39 L. Ed. 617-20.

The statute cited is in this language, the underscoring being our own:

"No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract or agreement by reason whereof the time in which to sue thereon is limited to a shorter period than two years. *And no stipulation, contract, or agreement for any shorter limitation in which to sue shall ever be valid in this state.*"

Under this statute and these decisions, we cannot agree with the able counsel for appellants that "Article 5545 does not make unlawful and contains no language showing that it was the intention of the Legislature to make unlawful any contract made in another state valid under the laws of such other state. Giving Article 5545 its literal interpretation it simply makes unlawful the entering into of a contract in this state by which the time to sue thereon is limited to a shorter period than two years. It will not be presumed without express language to such effect that the Legislature intended to prevent in Texas the enforceability of contracts made in another state, containing a provision entirely valid under the laws of such other state," in support of which the leading case relied upon is Railway v. Thompson, 100 Texas, 185.

[fol. 188] On the contrary, we think the quoted provision in this insurance contract must be held to be purely one of limitation, affecting the remedy only—not the substantive part of the agreement—and as such is controlled by and expressly denied enforcement under the quoted law of this state. The distinction between that provision and the one

ruled upon in the Thompson case appellants invoke is not only clearly made in that opinion, but in the later Hambrick case, supra, is reiterated and practically applied, both classes of contractual clauses being there involved; it simply is that stipulations for the giving of notice of a claim for damages under stated conditions constitute a valuable right going to the substance of the contract itself, while those merely undertaking to fix a limitation of time within which suit must be brought thereon are referable only to the mode of its enforcement in the courts of the country; as to the former, the lex loci contractus governs, as to the latter, the lex fori; Ry. v. McIntyre, 82 S. W. 348; Sanger v. Organ Co., 52 S. W. 622; Ry. v. Eddins, 26 S. W. 161; Ry. v. Vandeventer, 107 S. W. 561; 37 C. J. 730-731; Harris v. Balk, 198 U. S. 1027; Carrigan v. Semple, 72 Texas, 306, Bauserman v. Blunt, 147 U. S. 651-4, Tel. Co. v. Purdy, 162 U. S. 334, 40 L. Ed. 991.

The constitutional objections too, we think, have been adversely pre-determined by authorities that must be followed.

In Railway v. Eddins, supra, at page 164 of 26 S. W., Col. 2, the underscoring being our own, the court said:

[fol. 189] "It is the undoubted power of the state to pass laws prescribing periods of limitation in which remedies may be enforced, and to declare that limitation shall not within a certain time affect contracts that are made and entered into within its jurisdiction, or *sought to be enforced there.*"

That doctrine has become the generally accepted one, as the cases cited and discussed by the learned court make manifest.

It has likewise been so widely held that one's constitutional rights are not affected by a statute which either shortens or lengthens the period of limitation, provided the bar under the pre-existing one has not already become perfect, and, in the instance of a reduction of the time, the change is not so great as to practically leave him no remedy at all—in either of which events there would be a deprivation of property without due process of law; Campbell v. Holt, 115 U. S. 620, 29 L. Ed. 483, Landa v. Obert, 78 Texas, 46, Lewis v. Davidson, 51 Texas, at page 257, Smith v. Association, 112 Va. 192, 70 S. E. 482, 38 L. R. A. (N. S.) 1019.

In applying these principles to foreign contracts and statutes, the courts—somewhat illogically, as appears to this court and contrary to what would have been its conclusion upon the facts here, had the question come to it as one of first impression—have gone so far as to hold that in instances where one of the parties leaves the place of the contract before the bar of the foreign statute applicable to it has become complete, and either resumes his prior residence in or first becomes a citizen of another state or country, the limitation statute of the former—as to a cause of action not deriving its existence therefrom—will be inoperative [fol. 190] in the courts of the latter; in other words, that the lex fori still controls and that, too, whether or not the foreign statute, in terms, extinguishes the debt or merely bars the remedy; Canadian Pacific Ry. Co. v. Johnston, 61 Fed. 738, 9 C. C. A. 587, 25 L. R. A. 470 (Aff. 50 Fed. 886); Finnell v. Southern Kansas Ry. Co. 33 Fed. 427; Moores v. Winter, 67 Ark. 189, 53 S. W. 1057; Alexander v. Burnett, 39 S. C. L. 198; Hober v. Steiner, 2 Bing (N. C.) 202, 29 E. C. L. 501, 132 Reprint, 80.

The first cited of these cases is, perhaps, the most nearly analogous one of them upon the facts to that at bar; Johnston, a resident citizen of the State of Vermont, sued the Railway Company in the Vermont courts more than one year after the accident for damages on account of personal injuries received while a brakeman for it on one of its trains in Canada; the statutes of Canada provided:

"Article 2262. The following actions are prescribed in one year * * * For bodily injuries. * * * Art. 2267. In all cases mentioned in articles * * * and 2262, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired."

After disposing of other questions, the United States Circuit Court of Appeals said:

"But without attempting to pass upon what may be the effect of the statute under all circumstances, it is sufficient to say that, assuming that it possesses its largest character, and is a statute of extinguishment, it constituted no defense to the suit of this plaintiff in the state of Vermont, because, during the plaintiff's residence in Canada, it had not become operative, and had not extinguished the debt, so far

as courts in states foreign to Canada are concerned. The [fol. 191] injury happened on September 6, 1890. The plaintiff was at that time a citizen of Vermont, but after the injury he remained in Canada until April, 1891, when he returned to his mother's and his own home, in Vermont, and remained there continuously thereafter. When, before a statute of limitations has become operative, by way of extinguishment of the debt, as between two citizens or residents of a state, one of the parties has permanently changed his national domicile, and become a citizen of a foreign state, the statute will not become an absolute bar, as an extinguishment in the courts of such foreign state. It cannot become, in the country to which he has removed, an absolute extinguishment, unless the parties resided in the country of the statute during the whole period of limitation."

In this instance appellee Dick was never a citizen of Mexico, nor did he remain there long enough after the fire for the bar of the Mexican statute of limitation to become complete against his claim.

This rule requiring the continued residence of both parties in the country or state where the contract was made, or the injury done, for the full period of limitation there prescribed, in order to make it controlling rather than the law of the forum, has been adopted by the courts of Texas, as well as those of other jurisdictions; Atchison etc. Ry. Co. v. Mills, 53 Tex. Civ. App., 359, 116 S. W. 852; Smith v. Webb, 181 S. W. 820; Finnell v. Southern Kansas Ry. Co., 33 Fed. 427; Williams v. St. Louis, etc. Ry. Co., 132 Mo. 573, 27 S. W. 387.

Neither can it make any difference that the one-year limitation provision in this contract was valid under the laws of Mexico, because contrary to the expressed public policy of this state, as reflected in its quoted statute on that subject and the cited decisions of its courts; Knott v. Botany Mills, [fol. 192] 179 U. S. 68-9, 45 L. Ed. 90; Asphalt Co. v. Petroleum Co. 222 Fed. 1007; Messersmith v. Fidelity Co., 232 N. Y. 161, 133 N. E. 432, 19 A. L. R. 877; 13 Corpus Juris, 426; Parchem v. Chessman, 49 Mont. 326; 142 Pac. 631, 146 Pac. 469, Ann. Cases, 1916 A. 681.

After a careful review of the evidence touching the matter, we conclude there was no lack of support for the court's

finding that the vessel was a total loss within the meaning of the policy; while there was some testimony tending to indicate a retrieved value after some one had raised and repaired the old hull, even this was controverted, and there was neither a showing as to what the cost of the repairs had been nor as to whether that had in fact been greater than a prudent owner, which seems to be the legal test, would have undertaken; Ins. Co. v. McIntyre, 90 Texas, 170, 37 S. W. 1068, 35 L. R. A. 672; Corbett v. Ins. Co. 155 N. Y. 389, 41 L. R. A. 318; Livermore v. Ins. Co., 1 Mass. 264; 1 Am. & Eng. Ency. of Law (2nd Ed.) 8; Rogers v. Ins. Co., 139 S. W. 265; Ins. Co. v. Fogarty, 19 Wall, 640; Ins. Co. v. Homewood, 122 Pac. 196, 39 L. R. A. (N. S.) 1182.

The contracts of reinsurance of this risk issued by each of the garnishees to the main defendant, alike in substance and effect, were in this form:

"Declaration No. 6

The Home Insurance Company, New York

Please be advised that we have bound reinsurance as follows:

$15,000, U. S. Cy. (Part of $35,000. U. S. Cy.) on 'Waverly R.,' Tug boat, in favor of Chas. B. Bonner, Tampico.

Term: One year from 18th March, 1921, to 18th March, 1922.

Anglo-Mexicana Policy No. 18098. Item No. —. Rate: [fol. 193] 9%. Premium: $1,350.00 U. S. Cy.

Closed Bord. 2."

(Exhibit No. 3.)

To each was also attached what was termed a bordereau, which contained a list of the vessels to which the re-insurance was to attach.

We think these contracts were clearly those of indemnity against liability, not against loss only, and that debts arose under them between the re-insurers and the original insurer immediately upon the happening of the loss by fire under the policy sued on; that being true, and the garnishees being subject to the courts jurisdiction through local agents at Galveston, judgment was properly rendered on the find-

ings against all the defendants; Merc. Co. v. Weber, 191 N. W. 620, 27 A. L. R. 1395; Railway v. Swartz, 115 S. W. 275; 33 Corpus Juris, 61; Ins. Co. v. Ins. Co., 209 U. S. 326, 52 L. Ed. 815.

Affirmed.

Geo. W. Graves, Associate Justice.

[fols. 194-198] Motion for rehearing, covering five pages, filed May 17, 1928, omitted from this print. It was denied and nothing more by order May 24, 1928.

[fol. 199] In Court of Civil Appeals of Texas

No. 9206, 9156, 9157

[Title omitted]

Order Overruling Motion for Rehearing—May 24, 1928

"It is ordered that the motion of the appellants in these causes for rehearing be refused."

[fol. 200] In Supreme Court of Texas

The Home Insurance Company et al., Plaintiffs in Error,

vs.

C. J. Dick et al., Defendants in Error

Compania General Anglo-Mexicana de Seguros. S. A., Plaintiff in Error,

vs.

C. J. Dick, Defendant in Error

Petition for Writ of Error.—Filed Jun. 23, 1928

To the Supreme Court of Texas:

Your Petitioners, The Home Insurance Company and The Franklin Fire Insurance Company and Compania General

Anglo-Mexicana De Seguros, S. A., respectfully petition the Court for a writ of error to the Honorable, the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston for revision and correction of the judgment rendered in two certain consolidated causes pending in that court on appeal from the District Court of Galveston County, Texas, for the Fifty-sixth Judicial District, wherein your Petitioners were appellants and C. J. Dick, Texas & Gulf Steamship Company and Suderman & Young were appellees, in which said cause on April 19th, 1928, the said Court of Appeals affirmed the Judgment of the District Court of Galveston County against your Petitioner and your Petitioners' motion for rehearing was overruled on the 31st day of May, 1928.

[fol. 201] Brief Statement of the Case

The following statement of the case taken from appellants' brief in the Court of Civil Appeals and adopted by the Court of Civil Appeals in its opinion is correct.

A statement in these causes, which have been submitted and considered as one, acquiesced in by the appellees as being correct, is thus taken in full from the brief for appellants:

"C. J. Dick filed suit in the district court of Galveston County against Compania General Anglo-Mexicana De Seguros, S. A. (which will hereafter be called for brevity sake, 'the Mexican Insurance Company'), to recover $35,000 on a policy of insurance issued by the Mexican Insurance Company on the tug 'R Waverly', alleging that the vessel has caught on fire in Tampico, Mexico, and become a total loss, and that thereby the policy matured for the face thereof. The Mexican Insurance Company was a corporation incorporated under the laws of Mexico and had no agent in this State. Appellee, Dick, sued out ancillary writs of garnishment against the Home Insurance Company and The Franklin Fire Insurance Company, as garnishees of the Mexican Insurance Company. The Home Insurance Company and the Franklin Fire Insurance Company will hereafter be designated 'The American Insurance Companies.' The affidavit for garnishment was in statutory form.

In as much as many of the questions presented in these appeals are common to both the Mexican Insurance Company and the American Insurance Companies, this brief will be presented for all of them, with such additional portions as may be applicable to the Garnishees alone.

The Texas & Gulf Steamship Company and Suderman & Young were allowed to intervene in the suits. The American Insurance Companies, as garnishees, answered, denying any indebtedness to the Mexican Insurance Company. [fol. 202] The plaintiff filed a controverting affidavit alleging that each of the American Insurance Companies was indebted to the Mexican Insurance Company in the sum of $15,000.00, on the ground that shortly after the issuance of the policy by the Mexican Company it had reinsured its obligation assumed thereby with each of the American Companies to the extent of $15,000.00, and that hence each of the American Insurance Companies was indebted to the Mexican Insurance Company in that amount.

The Garnishees answered the controverting affidavit as follows:

That it is not true that by reason of the contract of reinsurance existing between these garnishees and the defendant herein, there became due and payable from the garnishees to said defendant the sum of Fifteen Thousand and 00/100 ($15,000.00) Dollars from each of these garnishees; but that to the contrary, the liability of these garnishees to said defendant is solely to indemnify it against any loss or judgment that it might have to pay upon said policy of insurance; that it is not true that these garnishees each have in their possession the sum of Fifteen Thousand and 00/100 Dollars ($15,000.00) belonging to the defendant, Compania General Anglo-Mexicana De Seguros, S. A.

These garnishees further respectfully show to the court that the only manner in which it is claimed that this court has jurisdiction over the defendant is by these garnishees, and the filing of a certain suit in this court numbered 39643 and entitled 'C. J. Dick versus Compania General Anglo-Mexicana De Seguros', in which suit there has been no actual service upon said defendant, but only constructive service by publication, and these garnishees are entitled to urge in this proceeding any defense that the said defendant might urge in said suit numbered 39643, and for such defense these garnishees allege:

[fol. 203] That plaintiff and intervener ought not to have or maintain said suit numbered 39643 against said defendant, or have or maintain this garnishment against these garnishees or either of them, because:

1. The policy of insurance mentioned in and declared upon by plaintiff's petition herein, and by the intervener, contained a stipulation and provision reading as follows:

'It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs'.

That said policy was issued in the Republic of Mexico, and that the above quoted provision thereof was and is valid and enforceable under the laws of the Republic of Mexico, and that said contract was performable and intended to be performed in Mexico, and the clause above quoted is and was valid as a defense to any suit brought to recover on said policy after the expiration of one year from the date of the accrual of the cause of action or damage to the vessel mentioned in plaintiff's petition; that this suit was filed within one year from and after the accrual of said cause of action, and these garnishees here now specially plead said facts and the said provisions and stipulation of said policy in bar of plaintiff's cause of action herein asserted against them and in bar of the plaintiff's cause of action asserted in said suit numbered 39643.

2. The contract sued on by plaintiff in said suit numbered 39643 was made in the Republic of Mexico, and intended to be performed in the Republic of Mexico, and was subject to the laws of said Republic of Mexico, which con-[fol. 204] tain certain provisions in Articles 1038, 1039, and 1043 of the Commercial Code of the Republic of Mexico, and which was in force at the time of the issuance of said policy, and at the time of the accrual of plaintiff's cause of action herein, and which read as follows:

Article 1038. 'The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code'.

Article 1039. 'The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against same is given'.

Article 1043. 'One year shall prescribe actions derived from contracts of life insurance, sea and land'.

That under and by virtue of the above quoted provisions of the Mexican laws, any cause of action such as that asserted by plaintiff herein is and was barred if no suit was instituted thereon within one year from the date of the accrual thereof, and these garnishees here now specially plead that no suit was instituted on said policy against the said defendant within such one-year period, and plead such fact and the fact that said suit numbered 39643 was not instituted within said one-year period, nor were the garnishments in this proceeding sued out within one year from the accrual of the cause of action, and plead the provisions of said commercial code of the Republic of Mexico in bar of these garnishments, and of said suit numbered 39643, and pray that they may be hence dismissed.

3. These garnishees further specially plead that the policy declared on by plaintiff in said cause numbered 39643 was void from its inception because it was then represented to the defendant that the value of the vessel alleged to have been insured thereby was in excess of the amount of such policy and these garnishees allege that in [fol. 205] fact said representations of plaintiff were not true, and the value of said vessel was not as much as the amount of said policy.

4. These garnishees allege that said vessel was not a total loss, and that notwithstanding such fact, the said vessel was abandoned by plaintiff without notice to the defendant in violation of the terms of the policy, and that it was the duty of plaintiff, under the terms of said policy to repair said vessel at the cost and expense of defendant, and defendant is liable, if at all, only for the cost of such repairs, and not for the face of such policy.

The defendant, Mexican Insurance Company, answered in the main suit by pleading the same provisions as to limitation under the Mexican Law, and the provisions of the contract and other defensive matters that were pleaded by the Garnishees, this answer being filed by attorneys appointed by the court to represent the Mexican Insurance Company, which had been cited by publication.

Appelle demurred to all of the allegations of the answers of the Mexican Insurance Company, and the garnishees, which set up contractual limitation and limitation under the laws of the Republic of Mexico. These demurrers were sustained by the court and judgment was rendered against the Mexican Insurance Company for $36,675.00, and against each of the American Insurance Companies, as garnishees for $18,337.50. The court filed findings of fact and conclusions of law in both cases, as follows:

I

'I find that on the 18th day of March, 1921, the defendant, the Compania General Anglo-Mexicana de Seguros, S. A., issued its policy No. 18098 to Charles B. Bonner of Tampico, Mexico, wherein said company insured the tug R. Waverly, also known as Waverly R. for a period of one [fol. 206] year from the last named date, for the sum of Thirty-five thousand ($35,000.00) Dollars, the loss or damage under said policy being payable to the Texas & Gulf Steamship Company and C. J. Dick, as their respective interests might appear; and that the defendant received from the parties interested the full amount of premium demanded for the issuance of said policy.

II

I find that on May 24, 1921, all the right of Charles B. Bonner in said policy was transferred to A. W. Turner, and that on July 18, 1921, all the rights of A. W. Turner in said policy were transferred to and solely vested in the plaintiff, C. J. Dick.

III

I find that the plaintiff, C. J. Dick, had a beneficial and insurable interest in said vessel, and that said policy hereinabove described, as originally issued was for the benefit of the plaintiff, C. J. Dick, and the Texas & Gulf Steamship Company, according to the respective interests of said parties in said vessel. That thereafter Suderman & Young duly acquired an interest in said policy or the proceeds thereof.

IV

I find that while said policy was in full force and effect, and on the 27th day of July, 1921, the vessel insured under the policy hereinabove described took fire and was burned and sunk in the harbor at Tampico, Mexico, and thereby became and was a total loss, said facts being made known to the insurance company by the proof of total loss required by the policy.

[fol. 207] V

I find that on the 29th day of March, 1921, the duly authorized agents of the Home Insurance Company and the Franklin Fire Insurance Company in Mexico City issued notices to said companies that each of them was bound for re-insurance in the sum of Fifteen Thousand ($15,000.00) Dollars under the policy No. 18098, and that said notices of re-insurance and the premiums for the same were accepted and acted upon by The Home Insurance Company and the Franklin Fire Insurance Company.

VI

I also find that the plaintiff and interveners have demanded payment of the defendant, and that no payment has ever been made.

VII

I find that C. J. Dick, the plaintiff, left Mexico where he was temporarily sojourning, within about ten days after the total loss of the R. Waverly, and that he has never at any time been a permanent resident of the Republic of Mexico, but that he has at all times been a resident citizen of the State of Texas.

VIII

I find that garnishments were issued in cause No. 49643 and that there is now in the hand of each of the garnishees, The Home Insurance Company and the Franklin Fire Insurance Company, Fifteen Thousand ($15,000.00) Dollars, making a total sum of Thirty Thousand ($30,000.00) Dollars belonging and due to the original defendant, Compania

General Anglo-Mexicana de Seguros, S. A., in the hands of said garnishees, together with interest on said sum from December 3, 1923, on which date the garnishees filed their answers in garnishment wherein they denied that they were indebted to the original defendant Compania General Anglo-Mexicana de Seguros, S. A.

[fol. 208] Conclusions of Law

I

I conclude as a matter of law that by reason of the policy and the total loss of said vessel, and the proof of same, the plaintiff and those entitled thereto in connection with the plaintiff should have judgment for the amount of money brought within the jurisdiction of this Court by garnishments issued in cause No. 39654.

II

I further conclude that the plaintiff and the interveners, they having agreed among themselves as to the amounts due between them, should have judgment against the garnishees for the sum sequestered by garnishment, and which said sum is found to be due from the garnishees to the original defendant."

The record discloses no action other than by implication on the appellees' demurrers, the judgments going in their favor for the several sums awarded, merely upon general recitations that the law and the facts were with them; joining in common cause, the Insurance Companies both Mexican and American, assail them, in substance, upon these grounds:

1. The court erred in not sustaining the contractual provision in the main policy involved, which in effect adopted Article 1043 of the Commercial Code of Mexico having like effect, and expressly prohibited suit thereon unless it was brought within one year after the accrual of the cause of action, this provision being valid under the laws of Mexico where the contract was made, and this suit not having been filed within that period;

2. The Texas R. S., Article 5545 would violate the Constitution of the United States, Article 1, Section 10, as well as the Fourteenth Amendment thereto, as impairing the [fol. 209] obligations of a contract against the appellees and depriving them of their property without due process of law, were it construed to be applicable to the contract sued upon in the main case here, which contained the one year limitation provision referred to;

3. "The court erred in holding that the vessel was a total loss, within the meaning of the policy, and, therefore, erred in holding that appellee was justified in abandoning her, because the facts were totally insufficient to show any such total loss";

4. The court erred in rendering the judgments, because the reinsurance agreements shown were contracts of indemnity only and not of liability.

This petition for writ of error is presented in behalf of both the Garnishees, the American Insurance Companies and the original defendant, the Mexican Insurance Company.

Grounds of Jurisdiction

(1)

This is a case involving the construction or the validity of a statute of the State of Texas, namely, Article 5545 of the Revised Statutes of 1925, reading, "No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract or agreement for any such shorter limitation in which to sue shall ever be valid in this state".

The Court of Civil Appeals construed Article 5545 as applying to an insurance contract made in Mexico and intended to be enforced in Mexico and held that the statute rendered such contractual provision void. Plaintiffs in Error attacked the validity of such statute as applicable to [fol. 210] such contract made in a foreign country.

The Court of Civil Appeals construed Article 5545 as rendering void and inapplicable in a suit brought in the State of Texas the provisions of the Mexican Commercial

Code prohibiting suit on such a contract as was involved in this case more than one year after the cause of action accrued and sustained the validity of Article 5545 as applicable to such a cause of action and as striking down the provisions of the Mexican Code.

The Court of Civil Appeals sustained the validity of Article 5545 in this case against the contention of plaintiffs in error that it was violative of the Constitution of the United States, Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States, as impairing the obligations of a contract against Plaintiffs in Error and as depriving them of their property without due process of law.

(2)

This is a case in which errors of law have been committed by the Court of Civil Appeals of such importance to the jurisprudence of the State as should require correction, as set out in the preceding Subdivision of this application and also in:

(a) Holding that the Tug "Waverly R" was a total loss, within the meaning of the policy, and that, therefore, appellee was justified in abandoning her because the facts were totally insufficient to show any total loss; and

(b) In affirming the judgment in favor of defendants in error against plaintiffs in error, because no judgment could be rendered against the Mexican Company cited by publication and a non-resident of Texas, unless there was a valid garnishment and the garnishment could not be held valid on the ground that there was any indebtedness of the gar- [fol. 211] nishees to the Mexican Company until and unless a valid judgment was rendered against the Mexican Company; therefore, the garnishees were not subject to garnishment because the re-insurance agreements were contracts of indemnity and not of liability.

All of the above grounds were presented in the Court of Civil Appeals and in the motion for rehearing filed by plaintiffs in error therein.

First Assignment of Error, Which is Presented as a Proposition

The policy upon which the main suit against the Mexican Company was based containing a contractual provision prohibiting suit thereon unless brought within one year from the date of the accrual of the cause of action, and this suit not having been filed within such period, and it being admitted by the demurrer filed by the defendants in error that such provision was valid under the laws of Mexico, where the contract was made, the Court of Civil Appeals erred in holding that this suit could be maintained, and in affirming the judgment against the Mexican Company and the American Companies as Garnishees, and erred in not sustaining the validity of such contractual provision.

Second Assignment of Error, Which is presented as a Proposition

The Court of Civil Appeals erred in giving Article 5545 the construction that it is applicable to a contract made under the laws of a foreign country containing a stipulation shortening the time for the bringing of suit thereon to less than two years, such stipulation being valid under the laws of such foreign country, because to give it such construction would make it unconstitutional in that it would [fol. 212] violate Article I, Section 10 of the Constitution of the United States, in that it would thereby impair the obligation of a contract and would violate the Fourteenth Amendment to the Constitution of the United States, in that it would thereby impair the obligation of a contract and would violate the Fourteenth Amendment to the Constitution of the United States, in that it would deprive the defendant and the garnishees of property without due process of law.

Third Assignment of Error, Which is Presented as a Proposition

The Court of Civil Appeals erred in holding that the court below correctly sustained the demurrer of appellees to the answers of garnishees and the Mexican Insurance

Company pleading the provisions of the laws of Mexico prohibiting suit filed more than one year after the cause of action accrued.

Additional Proposition under Above Assignment

Where a contract made in another jurisdiction expressly incorporates as a part thereof the laws of such other jurisdiction, such laws become a binding part of the contract and are not affected by a statute of the state of the forum, which if given effect in such a case would nullify the law of the place of the making of the contract.

Fourth Assignment of Error, Which is Presented as a Proposition

The Court of Civil Appeals erred in holding that the trial court did not err in rendering judgment in favor of defendants in error against plaintiffs in error. The Mexican Insurance Company and the garnishees, because no judgment could be rendered against the Mexican Insurance Company cited by publication and a non-resident of Texas, unless there was a valid garnishment and the garnishment could not be valid on the ground that there was any indebtedness of the garnishees to the Mexican Insurance Company until and unless a valid judgment was rendered against the Mexican Company, and, therefore, the garnishees were not subject to garnishment.

[fol. 213] Fifth Assignment of Error, Which is Presented as a Proposition

The Court of Civil Appeals erred in holding that the vessel which was the subject of the insurance contract sued on was a total loss, within the meaning of the policy, and therefore, erred in holding that defendant in error, C. J. Dick, was justified in abandoning her because the facts were totally insufficient to show any total loss.

Argument under the Foregoing Assignments of Error

Applicable to First Assignment of Error

The Court is respectfully referred to Subsivision 1 of the Argument contained in the brief of plaintiffs in error filed

in the Court of Civil Appeals, which will be found on pages 9, 10, 11 and 12 of said brief, and which we understand will be considered under Subdivision (j) of Rule 1.

Applicable to Third Assignment of Error

Plaintiffs in error pleaded the provisions of the Mexican Commercial Code as follows:

"Article 1038. 'The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code.'

Article 1039. 'The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against same is given.'

Article 1043. 'One year shall prescribe actions derived from contracts of life insurance, sea and land.' "

[fol. 214] The policy sued on in this case is fully set out in the stipulation of the parties and shown on pages 22 to 30 of the Statements of Facts. We invite the particular attention of the court to the fact that the policy was made in Mexico, covered a vessel located in Mexico, and was intended to be performed in Mexico, and to the provision of the policy shown on page 30 of the statement of facts, reading as follows:

"The present policy is subjected to the dispositions of the Commercial Code in that it does not alter or modify the stipulations which that same contains."

We submit that the above quoted provision of the policy expressly adopts the applicable provisions of the Mexican Commercial Code as a part of this policy. This being true, the contract made in Mexico expressly incorporates the law of the situs of the contract and such law becomes a binding part of the contract. Williston on Contracts, Vol. 2, Section 615. Manvell vs. Weaver, 102 Pac., 36; Long vs. Owen, 121 Pac., 99; Lorando vs. Gathero, 117 N. E. 188; Union National Bank vs. Chapman, 62 N. T. 672.

Applicable to Fourth Assignment of Error

It is the contention of plaintiffs in error that the entire judgment is invalid, both as to the Mexican Insurance Com-

pany and the garnishees, because the Mexican Insurance Company having been cited by publication, no judgment can be rendered against it, unless by virtue of a valid judgment, or garnishment. The garnishment can not be sustained, unless there was a valid debt by the garnishees to the Mexican Insurance Company. After the insurance policy sued on was issued by the Mexican Insurance Company, William B. Woodrow & Company, Insurance Underwriters and Adjusters, issued the following binder in behalf of the Home Insurance Company:

[fol. 215] "Declaration No. 6

The Home Insurance Company, New York

Please be advised that we have bound reinsurance as follows:

$15,000, U. S. Cy. (Part of $35,000. U. S. Cy.), on "Waverly R.," Tug boat, in favor of Chas. B. Bonner, Tampico.

Term: One year from 18th March, 1921, to 18th March, 1922.

Anglo-Mexicana Policy No. 18098. Item No. —. Rate: 9%. Premium: $1,350.00, U. S. Cy.

Closed Bord. 2."

Exhibit No. 3.

(S. of F. pp. 32-33), and a similar binder in behalf of The Franklin Fire Insurance Company (S. F. p. 33).

In the bordereau attached to the binders there was a list of vessels to which the re-issuance was to attach (S. F. pp. 37-40).

The most that can be said from the binders and the bordereau is that there was a re-insurance contract, by which the Mexican Company reinsured with the garnishees its risk under the policy sued on. There are no provisions in the binder or bordereau which are helpful in determining what the relations of the parties were.

It is clear that as in every other contract of reinsurance there is no privity between the assured and the reinsurers. The insured could not have maintained an action direct against the reinsurers.

There is no question but that there are many contracts (not of reinsurance, however) which make the surety liable

as soon as and whenever any facts exist which make the principal liable. A contract of reinsurance is not, however, [fol. 216] such a contract. It is a contract of indemnity merely. A contract of indemnity may indemnify the contractee against liablity or against loss. In either event, however, the result is the same, except that in the first instance the contractee or indemnitee need not have paid the loss, while in the second instance he must have paid the loss in order to hold the indemnitor liable. It has been held by authority of the highest repute that a reinsurance contract is a contract of insurance against liability, and not against the satisfaction of a loss. This, however, does not deprive the contract of its character as one of indemnity. The leading case in the country is Allemannia Insurance Company vs. Firemen's Insurance Company, 209 U. S. 326. In that case the reinsured company had become insolvent and the Supreme Court of the United States held that the re-insurer was liable to the Receiver of the re-insured under a contract of re-insurance, although the Receiver had not paid the assured in the policies. At page 332 of the opinion the court said:

"The contract is one of indemnity to the person or corporation reinsured and it binds the reinsurer to pay to the reinsured the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. It is not necessary that the reinsured should first pay the loss to the party first insured before proceeding against the reinsurer upon his contract. The liability of the latter is not affected by the insolvency of the insured or by its inability to fulfull its own contract with the original insured. The claim of the reinsured rests upon its liabiliy to pay its loss to the original insured and is not based upon the greater or less ability to pay by the reinsured."

We call particular attention to the words last quoted, namely, that the claim of the reinsured (against the reinsurer) rests upon the liability of the reinsured to pay its loss to the original assured. This language is particularly applicable to the point which we are now presenting to this court. No valid judgment could be rendered against the garnishees. In this case until there was a valid judgment [fol. 217] rendered against the Mexican Company, which

was the reinsured. The American Companies owed no debt of any kind to the Mexican Company until liability was fixed on the Mexican Company for the loss of the vessel involved. The mere fact that the vessel may have burned in whole or in part did not fix liability on the Mexican Company. There may have been a dozen different defenses under the Mexican law as against such liability. Certainly the defense of the provisions of the Mexican Commercial Code referred to in the earlier portion of this brief would have been good in a suit in Mexico. No court has held that in a contract of reinsurance the mere existence of facts which may or may not create a liability on the part of the reinsured give a rise to a debt of the reinsurer to the reinsured. It is true that reinsurance contracts are not construed to be contracts of indemnity against loss because the reinsured does not have to pay the loss before holding the reinsurer liable, but the loss must be asserted and fixed against the reinsured before the reinsurer can be held liable.

Applying the above argument to the facts of this case, no no valid judgment could be rendered against the Mexican Company on service by publication standing alone. The only way that such a judgment could be valid would be by attaching some of the Mexican Company's property in this state (and there was no such property), or by garnisheeing a person found in Texas who owed a debt to the Mexican Company. Appellee's suits are based upon the proposition, and can be based only upon the proposition that there was a valid debt of the American Companies to the Mexican Company until there was a liability on the part of the Mexican Company to the assured. Thus the argument proceeds in a circle. Appellees are forced to the position that their judgment against the Mexican Company is valid because [fol. 218] they have impounded a debt due by the American Companies to the Mexican Company, and that they have impounded such a debt because they have a valid judgment against the Mexican Company.

There are respectable authorities which hold that no garnishment can lie in this case where the situs of the debt was not in the state of the forum. Smith vs. Tabor, 16 T. C. A., 154, 40 S. W. 156; Central Trust Company vs. Chattanooga, etc. Railway Company, 68 Fed. 685; Douglass

vs. Phoenix Insurance Company, 138 N. Y. 209, 38 N. E. 938.

Applicable to Fifth Assignment of Error

The court is respectfully referred to Subdivision 4 of the argument contained in the briefs of Plaintiffs in Error in the Court of Civil Appeals appearing on pages 13 to 21 of their brief in that court, which is asked to be considered in connection with this assignment of error.

Your petitioners respectfully pray that this petition be granted, and the writ of error allowed for the correction of the errors of law herein complained of, and that upon hearing the judgments of the Court of Civil Appeals and the District Court be reversed and judgment rendered in favor of plaintiffs in error.

Messrs. Hughes, Lockhart & Hughes, Williams, Neethe & Williams and John L. Darrouzet, all of Galveston, Texas, are Attorneys of Record for Defendants in Error, and a copy of this Application is lodged in the office of the Clerk [fol. 219] of the Court of Civil Appeals for their use.

Respectfully submitted.

Terry, Cavin & Mills, Attorneys for Plaintiffs in Error.

[File endorsement omitted.]

In Supreme Court of Texas

[Title omitted]

Order Refusing Writ of Error—Dec. 15, 1928

This day came on to be heard the application of plaintiff in error for a writ of error to the Court of Civil Appeals for the First Dist. and the same having been duly considered, it is ordered that the appln. be refused; that applicants, The Home Ins. Co. and its surety, Globe Indemnity Company, and Franklin Fire Ins. Co. and surety, Globe Indemnity Company, pay all costs incurred on this appln.

[fol. 220] IN SUPREME COURT OF TEXAS

[Title omitted]

MOTION FOR REHEARING—Filed Dec. 29, 1928

To the Supreme Court of Texas:

Now come The Home Insurance Company and The Franklin Fire Insurance Company and Compania General Anglo-Mexicana De Seguros, S. A., and respectfully move the Court to grant them a rehearing of their application for Writ of Error filed in the above numbered and entitled consolidated causes and to set aside the order of this court entered on the 15th day of December, 1928, refusing your petitioners' application for writ of error, and, for grounds of this motion, these petitioners respectfully show:

1. This Honorable Court erred in failing and refusing to grant your petitioners' application for writ of error on the grounds set out in the first assignment of error, which is as follows:

"The policy upon which the main suit against the Mexican Company was based containing a contractual provision prohibiting suit thereon unless brought within one year [fol. 221] from the date of the accrual of the cause of action, and this suit not having been filed within such period, and it being admitted by the demurrer filed by the defendants in error that such provision was valid under the laws of Mexico, where the contract was made, the Court of Civil Appeals erred in holding that this suit could be maintained, and in affirming the judgment against the Mexican Company and the American Companies as Garnishees, and erred in not sustaining the validity of such contractual provision."

2. This Honorable Court erred in failing and refusing to grant your Petitioners' application for writ of error on the grounds set out in the second assignment of error, which is as follows:

"The Court of Civil Appeals erred in giving Article 5545 the construction that it is applicable to a contract made under the laws of a foreign country containing a

stipulation shortening the time for the bringing of suit thereon to less than two years, such stipulation being valid under the laws of such foreign country, because to give it such construction would make it unconstitutional in that it would violate Article I, Section 10 of the Constitution of the United States, in that it would thereby impair the obligation of a contract and would violate the Fourteenth Amendment to the Constitution of the United States, in that it would deprive the defendant and the garnishees of property without due process of law."

3. This Honorable Court erred in failing and refusing to grant your petitioners' application for writ of error on the grounds set out in the third assignment of error, which is as follows:

"The Court of Civil Appeals erred in holding that the court below correctly sustained the demurrer of appellees to the answers of garnishees and the Mexican Insurance [fol. 222] Company pleading the provisions of the laws of Mexico prohibiting suit filed more than one year after the cause of action accrued."

4. This Honorable Court erred in failing and refusing to grant plaintiffs in error's petition for writ of error herein on the grounds set out in their additional proposition under the third assignment of error, which additional proposition is as follows:

"Where a contract made in another jurisdiction expressly incorporates as a part thereof the laws of such other jurisdiction, such laws become a binding part of the contract and are not affected by a statute of the state of the forum, which if given effect in such a case would nullify the law of the place of the making of the contract."

5. This Honorable Court erred in failing and refusing to grant your petitioners' application for writ of error on the grounds set out in the fourth assignment of error, which is as follows:

"The court of Civil appeals erred in holding that the trial court did not err in rendering judgment in favor of defendants in error against plaintiffs in error, the Mexican Insurance Company and the garnishees, because no judg-

ment could be rendered against the Mexican Insurance Company cited by publication and a non-resident of Texas, unless there was a valid garnishment and the garnishment could not be valid on the ground that there was any indebtedness of the garnishees to the Mexican Insurance Company until and unless a valid judgment was rendered against the Mexican Company, and, therefore, the garnishees were not subject to garnishment."

6. This Honorable Court erred in failing and refusing to grant your petitioners' application for writ of error on the grounds set out in the fifth assignment of error, which is as follows:

[fol. 223] "The Court of Civil Appeals erred in holding that the vessel which was the subject of the insurance contract sued on was a total loss, within the meaning of the policy, and, therefore, erred in holding that defendant in error, C. J. Dick, was justified in abandoning her because the facts were totally insufficient to show any total loss."

Plaintiffs in error reiterate all of the arguments, authorities and grounds set out in their original petition for writ of error and in their brief filed in the Court of Civil Appeals and respectfully ask that this motion for rehearing be granted and that their petition for writ of error be granted.

Respectfully submitted.

Terry, Cavin & Mills, Attorneys for Petitioners.

[fol. 224] IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER GRANTING MOTION FOR REHEARING AND GRANTING WRIT OF ERROR—January 23, 1929

It is ordered by the Court that the Motion for rehearing herein by the plff. in error be granted and the judgment of this court as entered in the Minutes of Dec. 15th, 1928, refusing the appln. be vacated and set aside and the following judgment be entered in lieu thereof:

This day came on to be heard the appln. of plff. in error for a writ of error to the Court of Civil Appeals for the First Dist., and the same having been duly considered, it is ordered that the appln. be granted and the writ of error issue as prayed for.

[fol. 225] IN SUPREME COURT OF TEXAS

April 10th, 1929.

No. 5265, No. 1235

THE HOME INSURANCE COMPANY (Compania General Anglo-Mexicana de Seguros, S. A.) et al.

vs.

C. J. DICK et al.

From Galveston Co., 1st Dist.

JUDGMENT—April 10, 1929

This cause having been referred to the Commission of Appeals for their examination and report and said Commission having reported in a written opinion by Hon. Richard Critz, Judge of Section "A", that there was no error in the judgments of the Court of Civil Appeals and District Court, and recommending that said judgments be affirmed, and said report together with the record in the cause having been duly considered and the judgment as recommended by the Commission of Appeals having been approved by the Court, it is therefore ordered, adjudged and decreed that the judgments of the Court of Civil Appeals and District Court be in all things affirmed; that the defendants in error, C. J. Dick, Texas & Gulf Steamship Company and Suderman & Young, Inc., do have and recover of and from the plaintiffs in error, The Home Insurance Company and its surety, Globe Indemnity Company, and of The Franklin Fire Insurance Company and its surety, Globe Indemnity Company, the sum or sums adjudged to them or each of them in the District Court. It is further ordered that the plaintiffs in error, The Home Insurance

Company, The Franklin Fire Insurance Company, and the Compania General Anglo-Mexicana De Seguros, S. A. and their surety, Globe Indemnity Company, pay all costs in this behalf expended in this Court, the Commission of Appeals, and Court of Civil Appeals, and this decision be certified to the District Court for observance.

[fol. 226] IN SUPREME COURT OF TEXAS

Commission of Appeals, Section A

No. 1235, 5265

[Title omitted]

OPINION—Filed April 10, 1929

Statement of the Case

C. J. Dick filed suit in the District court of Galveston County, Texas, against Compania General Anglo-Mexicana de Seguros, S. A., hereinafter called the Mexican Company, to recover $35,000 on a policy of fire insurance issued by the Mexican Company on a boat of some character. It is alleged, and found by the trial court, that the boat was totally destroyed by fire and sunk in the harbor of Tampico, Mexico, on July 27, 1921, while the policy of fire insurance was in force. The Mexican Company was a corporation incorporated under the laws of the Republic of Mexico, and had no agent in this state. This company was cited in this cause by publication as provided under our statutes, and attorneys were appointed by the trial court to represent it. Said Mexican Company answered by and through said attorneys alone.

Dick, the plaintiff in the original suit, sued out ancillary writs of garnishment against Home Insurance Company and Franklin Fire Insurance Company, with whom the Mexican Company had re-insured the risk, as garnishees of the Mexican Company. The two garnishees are both American companies doing business in this state, and were duly served by service on their local agents as required by the Texas statutes. The Texas & Gulf Steamship Com-

[fol. 227] pany and Suderman & Young were allowed to intervene in the suit on grounds we are not here interested in.

On final trial in the District court, judgment was rendered against the Mexican Company for $36,675.00, and against each of the garnishees for one-half that amount, $18,337.50. The cases were duly appealed to the Court of Civil Appeals for the First District at Galveston, which court in all things affirmed the judgment of the trial court. 8 S. W. (2d) 354. The cause is now before this court on writ of error granted on application of the three insurance companies.

The Court of Civil Appeals makes a very full and complete statement of the issues involved in this case, and as such issues require a very extended statement, for the sake of brevity, we refer to the statement made by the Court of Civil Appeals, 8 S. W. (2d) pp. 355 to 357, inclusive.

Opinion

The first assignment of error of the three insurance companies is as follows:

"The policy upon which the main suit against the Mexican Company was based containing a contractual provision prohibiting suit thereon unless brought within one year from the date of the accrual of the cause of action, and this suit not having been filed within such period, and it being admitted by the demurrer filed by the defendants in error that such provision was valid under the laws of Mexico, where the contract was made, the Court of Civil Appeals erred in holding that this suit could be maintained, and in affirming the judgment against the Mexican Company and the American Companies as garnishees, and erred in not sustaining the validity of such contractual provision."

[fol. 228] As shown by the pleadings of the Mexican Company, and the garnishees, the original insurance policy constituted a contract entered into in the Republic of Mexico, and contained the following stipulation:

"It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the col-

lection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs."

"The present policy is subjected to the dispositions of the commercial code in that it does not alter or modify the stipulations which that same contains."

The insurance companies then pleaded Articles 1038, 1039 and 1043, of the Mexican Commercial Code, which read as follows:

Article 1038. "The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this code."

Article 1039. "The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against the same is given."

Article 1043. "One year shall prescribe actions derived from contracts of life insurance, sea and land."

It will be seen from the above facts that the policy of fire insurance made the basis of this suit was barred by the statutes of limitation of the Republic of Mexico, at the time the suit was filed in the district court of Galveston County, Texas, but was not barred by any statute [fol. 229] of limitation in this state. It therefore follows that if the laws of limitation of Mexico, the place where the contract was made, must govern, then the pleas of limitation of the insurance companies should be sustained, but on the other hand, if the laws of Texas, the lex forum, should govern, then the insurance companies are liable.

We are of the opinion that it is the settled law of this state that the contractual and statutory limitations pleaded by the insurance companies, lawful in the Republic of Mexico, are unenforceable in this state because they are contrary to the statutory laws of Texas, and to the public policy of this state as expressed by the statutes and decisions of same, and because the question of limitation is one which depends upon the law of the forum. R. C. S. of Texas, Art. 5545; Gautier vs. Franklin, 1 Texas, 732; Carrigan vs. Semple, 72 Texas, 306. We might cite numerous other authorities in this state and out of it holding that statutes of limitation relate only to the remedy, and are con-

trolled by the law of the forum irrespective of the place of the contract, but we consider this question too well settled to require further discussion.

It is contended by the insurance companies that the statutes of Mexico above quoted are more than mere statutes of limitation, but are statutes of prescription, operate not only to bar the right of recovery by limitation, but operate to kill the cause of action after the lapse of one year without filing suit. We are of the opinion that there is no difference or distinction to be drawn between statutes of limitation and statutes of prescription so far as the application of the rule that the law of the forum governs. R. C. S. of Texas, 1925, Art. 5545; Gautier vs. Franklin, 1 Texas, 732.

[fol. 230] However, even if it should be held that there is a distinction to be drawn between a prescriptive statute that kills the cause of action, and a statute of limitation that merely bars the right of recovery by limitation where limitation is pleaded, still in this case the result would be the same as it is shown that Dick removed from Mexico a few days after the boat in question was destroyed, and has lived in Texas ever since. Under such circumstances a prescriptive statute of Mexico would be no defense in the courts of Texas. 37 C. J., p. 732, Sec. 50, and notes; Ry. Co. vs. Mills, 116 S. W., 853 (Civ. App. writ ref'd).

We have treated the three articles of the Mexican code quoted as prescriptive statutes in the sense of operating to extinguish or kill the cause of action, which is more than a mere statute of limitation, though we do not know what construction has been placed thereon by the courts of that country. But regardless of whether they be mere statutes of limitation or statutes which operate to obliterate and kill, they come well within the provisions of Art. 5545 of our civil statutes, which prohibits any person, firm or corporation, etc., from entering into any character of contract or agreement by reason whereof the time in which to sue is limited to a shorter period than two years. If this statute can be avoided by making the contract kill the cause of action, instead of barring it by limitation, then it is a useless thing and amounts to nothing.

The insurance companies contend by their second assignment of error that if Article 5545 R. C. S. of Texas, 1925, be given the construction that it is applicable to a contract

[fol. 231] made under the laws of a foreign country containing a stipulation shortening the time for bringing the suit thereon to less than two years, such stipulation being valid under the laws of such foreign country, that it is unconstitutional, in that it would violate Article 1, Sec. 10, of the Constitution of the United States, in that it would thereby impair the obligation of a contract, and would violate the Fourteenth Amendment to the Constitution of the United States, in that it would deprive the defendant and the garnishees of property without due process of law.

Our answer to that is that it is well settled that parties have no constitutional rights in matters which are not a substantial part of the contract, but which refer to the remedy only. Statutes of limitation and agreed limitations have been uniformly held to affect the remedy only. Therefore, constitutional rights are not affected by a statute which shortens the limitation period or lengthens it unless the time to which the period of limitation is shortened is such that it practically deprives a party of property without due process of law. Campbell vs. Holt, 15 U. S. 620; 29 L. Ed. 483; Landa vs. Obert, 78 Tex., 46. In the above cited case the Supreme Court of the United States says:

"We are unable to see how a man can be said to have a property right in the bar of the statute as a defense to his promise to pay."

Of course had both parties remained in the Republic of Mexico until the bar of the statutes of that country had actually and fully operated, a different question would be presented; and, under the rule that where personal property is held adversely in one state for a sufficient length of time to acquire title thereto by prescription or limitation, such title will be recognized in other states, it might be that, under the statutes of Mexico, and the contract in question, this cause would be barred in Texas. 37 C. J., p. 732, [fol. 232] Sec. 50. No such question is presented in this case.

By proper assignment the insurance companies contend that the Court of Civil Appeals erred in holding that the trial court did not err in rendering judgment in favor of defendants in error and against the Mexican Company, and the two garnishees, because no judgment could be rendered

against the Mexican Company cited by publication, and a non-resident of Texas, unless there is a valid garnishment, and the garnishment could not be valid on the ground that there was an indebtedness of the garnishees to the Mexican Company until and unless a valid judgment was rendered against the Mexican Company, and, therefore, the garnishees were not subject to garnishment.

This assignment should be overruled. The record shows valid garnishments which impounded funds in this state in the hands of the two garnishees. These garnishees are insurance companies, doing business in Texas, having a permit from this state, and having local agents at Galveston, Texas, where they were served and have answered by reason of such service. Clearly, the test of jurisdiction for garnishment under all the authorities is whether or not the debtor (garnishee) is subject to suit at the hands of the creditors in the jurisdiction where the garnishment is sought. M. K. & T. Ry. Co. vs. Schwartz, 115 S. W. 275; Bingenheimer Merc. Co. vs. Weber, 191 N. W. 620, 27 A. L. R. 1395; Chicago R. I. & P. Ry. Co. vs. Strum, 174 U. S. 710, 43 L. Ed. 1144; Harris vs. Balk, 198 U. S. 414-428, 49 L. Ed. 1023; Louisville & N. Ry. Co. vs. Deer, 200 U. S. 177, 50 L. Ed. 426. It is also well settled that foreign insurance companies doing business by agents within a state are treated as residents of the state and debts due from them to non-residents are garnishable in the state where they are doing business. Louisville & Nashville Ry. Co. v. Deer, 200 U. S., 177, 50 L. Ed., 426; Lancashire Ins. Co. [fol. 233] vs. Corbetts, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631; National Fire Ins. Co. vs. Chambers, 53 N. J. Eq., 468, 32 Atl. 663; Fithian vs. New York & E. R. Co., 31 Pa. 114; Selma R. & D. R. Co. vs. Tyson, 48 Ga., 351; German Bank vs. American Fire Ins. Co., 83 Iowa, 32 Am. St. Rep. 316, 50 N. W. 53; Cousens vs. Lovejoy, 81 Me. 467, 17 Atl. 495; Burlington & M. River R. Co. vs. Thompson, 31 Kan. 194, 47 Am. St. Rep. 497, 1 Pac. 622.

In this connection it will be noted that the three insurance companies urge that there was no debt due from the two American companies to the Mexican Company. We cannot sustain this contention. The rule is that a debt arises between the original insurer and the re-insurer immediately upon the happening of a loss under an insurance

policy. Alimania Fire Ins. Co. vs. Fireman's Ins. Co., 209 U. S. 326, 52 L. Ed. 815. Also the boat being a total loss, the claim was liquidated and subject to garnishment. Of course the judgment against the Mexican Company cannot have the effect of a personal judgment, but is only a judgment in rem.

We recommend that the judgment of the Court of Civil Appeals be affirmed.

Richard Critz, Judge.

No. 5265

The Home Insurance Co., etc., Plaintiff in Error,

vs.

C. J. Dick et al., Defendants in Error

Judgment of the Court of Civil Appeals affirmed, as recommended by the Commission of Appeals.

C. M. Cureton, Chief Justice.

April 10, 1929.

[File endorsement omitted.]

[fols. 234-237] Motion for rehearing, covering four pages, filed April 24, 1929, omitted from this print. It was denied and nothing more by order June 12, 1929.

[fol. 238] In Supreme Court of Texas

[Title omitted]

Order Overruling Motion for Rehearing—June 12, 1929

It is ordered by the Court that the motion for rehearing herein by the plff. in error be overruled as recommended by the Commission of Appeals.

IN SUPREME COURT OF TEXAS

[Title omitted]

PETITION FOR APPEAL—Filed June 14, 1929

To the Honorable C. M. Cureton, Chief Justice of the Supreme Court of the State of Texas:

The petition of The Home Insurance Company and Franklin Fire Insurance Company respectfully shows:

1. On the 27th day of October, 1923, an action was filed in the District Court of Galveston County, State of Texas, for the Fifty-sixth Judicial District by C. J. Dick as Plaintiff against Compania General Anglo-Mexicana De Seguros, S. A., as defendant.

The suit was based upon an insurance policy alleged to have been issued by the defendant therein on or about the 18th day of March, 1921, insuring the Tubboat "R. Wav-
[fol. 239] erly" against loss by fire and other casualties and sought to recover the face value of said policy, namely Thirty-five thousand and 00/100 Dollars ($35,000.00) and interest.

2. On the same day, to wit, October 27th, 1923, the plaintiff in said cause, C. J. Dick, made application for writ of garnishment against these appellants as garnishees of said Compania General Anglo-Mexicana De Seguros, S. A., said garnishment proceeding being instituted in the District Court of Galveston County, State of Texas, for the fifty-sixth Judicial District, and numbered 39645 on the docket of said court.

3. In said garnishment proceeding these appellants, as such garnishees, answered on December 3rd, 1923, that they were not indebted to said Compania General Anglo-Mexicana De Seguros, S. A., and had none of its effects in their possession. Prior to the filing of such answer, Texas & Gulf Steamship Company and Suderman & Young, Inc., intervened in said cause and garnishment proceeding under leave of the court, and after such answer in garnishment was filed, a controverting affidavit was filed alleging that these appellants, as such garnishees, were indebted to said Compania General Anglo-Mexicana De Seguros, S. A. in

the sum of Fifteen thousand and 00/100 Dollars ($15,000.00) each, under certain re-insurance agreements entered into between them and said Compania General Anglo-Mexicana De Seguros, S. A., by which each of said garnishees re-insured Fifteen Thousand and 00/100 Dollars ($15,000.00) of the liability of said Compania General Anglo-Mexicana De Seguros, S. A. under said policy issued by it upon said Tugboat "R. Waverly."

4. It was alleged in said suits that the Tug "R. Waverly," had become a total loss by fire while in the harbor of Tampico, Mexico.

[fol. 240] 5. There was never any service of citation, or other process upon said Compania General Anglo-Mexicana De Seguros, S. A., except constructive service by publication, it being a non-resident of the State of Texas.

6. After the filing of the controverting affidavit to the garnishees' answers, these appellants, as such garnishees, filed an answer thereto denying that they were indebted to said Compania General Anglo-Mexicana De Seguros, S. A. in the sum of Fifteen Thousand and 00/100 Dollars ($15,000.00) each, alleging that they were entitled to urge in said proceeding any defenses to plaintiffs' suit that might have been urged by said Compania General Anglo-Mexicana De Seguros, S. A., and pleading in bar of plaintiffs' suit that the policy sued upon provided as follows: "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs." That said policy was issued in the Republic of Mexico and that the above quoted provision thereof was valid and enforcible under the laws of Mexico; that the contract was performable and intended to be performed in Mexico, and that the clause above quoted was valid as a defense to any suit brought to recover on said policy after the expiration of one year from the date of the accrual of the cause of action or damage to the vessel; that the suit was not filed within one year, and such policy provision was pleaded in defense of plaintiffs' and intervenors' suit. Appellants, as such garnishees, further provided that said insurance policy was executed in the Republic of Mexico,

was intended to be performed in the Republic of Mexico, and was subject to the laws of the Republic of Mexico, and [fol. 241] pleaded certain provisions of the Commercial Code of the Republic of Mexico, which it was alleged were in force at the time of the issuance of said policy and at the time of the accrual of plaintiffs' cause of action, as follows:

Article 1038. "The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this code."

Article 1039. "The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal, except restitution against same is given."

Article 1043. "One year shall prescribe actions derived from contracts of life insurance, sea and land."

That under the above quoted provisions of the Mexican Law, the cause of action asserted by plaintiff was barred, and that no suit was instituted thereon within such one year period, nor were the garnishment proceedings sued out within any such period.

7. To the said answer of the garnishees, the plaintiff filed a general demurrer based upon:

(a) Because the portions of said answer setting up the contractual provisions of the policy do not form a portion of the cause of action;

(b) Because the statute of the State of Texas prohibits a contractual limitation of less than two years.

(c) Because said matters are in violation of the public policy of the State of Texas and void in a Texas court.

8. Upon hearing of the foregoing demurrer, the District Court of Galveston County sustained the same and held that the contractual provisions of the policy above quoted and the provisions of the Mexican Commercial Code above set out constituted no defense to this proceeding, because of the provisions of Article 5535 of the Revised Civil Statutes of Texas of 1925, (which was continuously in force [fol. 242] at all of the times herein mentioned) and which reads as follows:

"No person, firm, corporation, association or combination of whatsoever kind, shall enter into any stipulation,

contract, or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract or agreement for any such shorter limitation in which to sue shall ever be valid in this State."

Said District Court held further that said Article 5545 of the Revised Civil Statutes of Texas, 1925, was not in conflict with either Section 10 of Article I of the Constitution of the United States, or the Fourteenth Amendment to the Constitution of the United States, and refused to allow these apellants as such garnishees to introduce evidence in support of their said pleadings. Upon final hearing, judgment was rendered by the said District Court of Galveston County, Texas, in said Cause No. 39643, in favor of the Plaintiff, C. J. Dick, for Seventeen thousand, five hundred and eighty-seven and 50/100 Dollars ($17,587.50) and in favor of the Intervenors, Texas & Gulf Steamship Company and Suderman & Young, Inc., for Nineteen thousand, eighty-seven and 50/100 Dollars ($19,087.50) against said Compania General Anglo-Mexicana De Seguros, S. A., together with interest thereon from July 26th, 1927, the date of said judgment, at the rate of six (6) per cent per annum, and judgment was rendered in said garnishment proceeding (the main cause and the said garnishment proceeding having been tried together as one cause) in favor of the plaintiff, C. J. Dick, and the Intervenors, Texas & Gulf Steamship Company and Suderman & Young, Inc., against The Home Insurance Company, as such garnishee, for Eighteen Thousand, Three Hundred and Thirty-seven and 50/100 Dollars ($18,337.50), and against Franklin Fire Insurance Company for the same amount, each of said [fol. 243] amounts to bear interest at six (6) per cent per annum from the date of said judgment, namely, July 26th, 1927.

9. Thereafterwards, on the 11th day of August, 1927, these appellants and said Compania General Anglo-Mexicana De Seguros, S. A., duly perfected their appeals from the said judgments to the Court of Civil Appeals of Texas for the First Supreme Judicial District, sitting at Galveston, these appellants giving supersedeas bonds each in the sum of Forty-thousand and 00/100 Dollars ($40,000.00), in

order to supersede judgment, and said Compania General Anglo-Mexicana De Seguros, S. A. filing an appeal bond in the nature of a cost bond from said judgment.

10. Thereafterwards said appeal coming on to be duly heard in said Court of Civil Appeals, and on the 3rd day of May, 1928, said court entered its judgment and filed its opinion affirming the judgment of the District Court of Galveston County, Texas, and sustaining the validity of said Article 5545 of the Revised Civil Statutes of Texas of 1925, as against the claim of these appellants, that the same was in violation of and contrary to Section 10 of Article 1 of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States, said decision being in favor of the validity of said statute.

11. Afterwards these appellants seasonably filed a motion for rehearing in said Court of Civil Appeals, which having been considered by said court, was overruled by said Court on May 24th, 1928.

12. Thereafterwards, within the time limited by the time permitted by the statutes of the State of Texas, these appellants and said Compania General Anglo-Mexicana De Seguros, S. A., duly filed their petition for writ of error from the Supreme Court of Texas to said Court of Civil [fol. 244] Appeals, and on the 23rd day of January, 1928, said writ of error was granted by the Supreme Court of Texas.

13. Thereafterwards, the said Supreme Court of Texas referred said case for hearing and submission to Section A of the Commission of Appeals of the State of Texas, and on the 13th day of March, 1929, the said cause was submitted to and heard by said Commission of Appeals of the State of Texas.

14. Thereafterwards, on April 10th, 1929, the Supreme Court of the State of Texas entered its judgment, order and decree affirming the judgments of the District Court of Galveston County, Texas, and of the Court of Civil Appeals above referred to upon the recommendation of an opinion of said Section A of said Commission of Appeals, and holding thereby that Article 5545 of the Revised

Civil Statutes of Texas, 1925, was not in violation of Section 10 of Article I of the Constitution of the United States, or of the Fourteenth Amendment to the Constitution of the United States, and sustaining the validity of said statute in this suit, in which the validity of said statute had been drawn in question on the ground of its being repugnant to the Constitution of the United States.

15. Thereafterwards, in due course, these appellants filed their motion for rehearing of this cause in said Supreme Court of Texas, which after having been duly submitted, was overruled by said Supreme Court of Texas on the 12th day of June, 1929.

16. That said Supreme Court of Texas is the Highest Court of the State of Texas in which a decision in this suit can be had, and therein and in said Court of Civil Appeals and in said District Court these appellants drew in question the validity of a statute of the State of Texas [fol. 245] to-wit, Article 5545 of the Revised Civil Statutes of the State of Texas, 1925, on the ground of its being repugnant to the Constitution of the United States, and the decision of said courts was in favor of its validity.

17. Wherefore these appellants, your petitioners, conceiving themselves aggrieved by the order of affirmance of said judgment entered on April 10th, 1929, in the above proceeding, do hereby appeal from said order and judgment to the Supreme Court of the United States under the provisions of United States Code, Title 28, Section 344 (Judicial Code, Section 237, as amended), on the ground that the decision of the Supreme Court of the State of Texas was a decision in which the validity of a statute of the State of Texas was drawn in question on the ground that it was repugnant to the Constitution and laws of the United States and the decision of said court was in favor of the validity of the said statute of the State of Texas, and these appellants do hereby appeal from said order and decision of the Supreme Court of the State of Texas to the Supreme Court of the United States, and they pray that this their appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States. There accom-

panies this petition for appeal an assignment of errors, and it is prayed that an order be entered fixing the amount of the security which the appellants shall give in order to supersede said judgment or order of the Supreme Court of Texas, and that these appellants may have such other [fol. 246] and further relief in the premises as may be just.

Terry, Cavins & Mills, Attorneys for the Home Insurance Company and Franklin Fire Insurance Company.

Duly sworn to by Ballinger Mills. Jurat omitted in printing.

Read on petition for appeal this the 14th day of June, 1929.

C. M. Cureton, Chief Justice of the Supreme Court of the State of Texas.

[File endorsement omitted.]

[fol. 247] IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER GRANTING APPEAL—Filed June 14, 1929

Upon this, the 14th day of June, 1929, there came on to be heard the petition of The Home Insurance Company and Franklin Fire Insurance Company for appeal of the above numbered and entitled cause from the Supreme Court of the State of Texas to the Supreme Court of the United States, and upon examination of the petition for appeal, the assignment of errors and the record in such matter, it is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be, and it is hereby allowed, as prayed, and that upon the filing of a bond conditioned as required by law, and in accordance with the Statutes of the United States, and the rule of the Supreme Court of the United States in the sum of Five Thousand and no/100 ($5,000.00) to be approved by the Clerk of this Court, the judgment hereby appealed from shall be superseded and execution thereon stayed subject to the deter-

mination of this case by said Supreme Court of the United States.

It is further ordered that citation on appeal be issued by the Clerk of this court and certified according to law, and that a true copy of the record, assignment of errors, and all [fol. 248] proceedings in this cause be transmitted to the Supreme Court of the United States, duly certified according to law, in order that the Supreme Court of the United States may inspect the same and take such action thereon as it may deem proper.

Dated at Austin, Texas, the 14th day of June, 1929.

C. M. Cureton, Chief Justice of the Supreme Court of the State of Texas.

[File endorsement omitted.]

IN SUPREME COURT OF TEXAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 14, 1929

Now comes The Home Insurance Company and Franklin Fire Insurance Company, Appellants in the above numbered and entitled cause, and in connection with their petition for appeal to the Supreme Court of the United States, make and file their Assignment of Errors, as follows:

First. The Supreme Court of the State of Texas in deciding that Article 5543 of Revised Civil Statutes of the State of Texas applied to the contract of insurance made between C. J. Dick and Compania General Anglo-Mexicana De Seguros S. A., in Mexico, and covering the boat "Waverly R," located in Mexico, erred in that the statute so applied [fol. 249] impairs the obligation of a contract in violation of Article 1, Section 10, Clause 1, of the Constitution of the United States, whereby was drawn in question the validity of a statute of the State of Texas on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

Second. The Supreme Court of the State of Texas in deciding that Article 5545 of Revised Civil Statutes of the

State of Texas applied to the contract of insurance made between C. J. Dick and Compania General Anglo-Mexicana De Seguros S. A., in Mexico, and covering the boat "Waverly R," located in Mexico, erred in that the statute so applied deprives the appellants of liberty and property without due process of law in violation of Amendment 14, Section 1 of the Constitution of the United States, whereby was drawn in question the validity of a statute of the State of Texas on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

Third. The Supreme Court of the State of Texas erred in not rendering judgment in favor of appellants because said Article 5545 of the Revised Civil Statutes of the State of Texas as applied to the contract of insurance made between C. J. Dick and Compania General Anglo-Mexicana De Seguros S. A., in Mexico, and covering the boat "Waverly R.", located in Mexico, and as applied to appellants is unconstitutional and void and in conflict with and in violation of Article 1, Section 10, Clause 1, of the Constitution of the United States and in conflict with and in violation of Amendment 14, Section 1 of the Constitution of the United States, whereby was drawn in question the validity of a statute of the State of Texas on the ground of its being re-
[fol. 250] pugnant to the Constitution of the United States and the decision is in favor of its validity.

Fourth. The Supreme Court of the State of Texas erred in holding that under the construction given by it to Article 5545 of the Revised Civil Statutes of Texas, 1925, the same is not violative of Article I, Section 10, of Clause 1 of the Constitution of the United States.

Fifth. The Supreme Court of Texas erred in holding that under the construction given by it to Article 5545 of the Revised Civil Statutes of Texas, 1925, the same is not violative of the Fourteenth Amendment to the Constitution of the United States.

Terry, Cavin & Mills, Attorneys for the Home Insurance Company and Franklin Fire Insurance Company, Appellants.

Read on petition for appeal this, the 14th day of June, 1929.

C. M. Cureton, Chief Justice of the Supreme Court of the State of Texas.

[File endorsement omitted.]

[fol. 251] Stipulation of counsel as to amount of supersedeas bond omitted in printing.

[fols. 252 & 253] Supersedeas bond on appeal for $5,000.00, approved and filed June 17, 1929, omitted in printing.

[fol. 254-255] Citation, in usual form, showing service on J. L. Darrouzet et al., filed June 17, 1929, omitted in printing.

[fol. 256] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 257] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 24, 1929

Come now the appellants in the above entitled cause and state that the points upon which they intend to rely in this case are as follows:

1. That the Supreme Court of the State of Texas erred in finding and holding that the State of Texas could by statute (viz: Article 5545 of the Revised Civil Statutes, 1925, of the State of Texas) authorize, or confer jurisdiction upon, the courts of Texas to change the terms, or delete the clear provisions, of a contract of insurance made and to be performed in Mexico, insuring a vessel located

in Mexico, and valid under the laws of Mexico, which contract, when made, was between two parties neither of whom was a citizen or resident of Texas; because such statute is invalid as repugnant to Paragraph 1 of Section 10 of Article I of the Constitution of the United States in that [fol. 258] it impairs the obligation of the said contract in violation of the said article of the Constitution of the United States.

2. That the Supreme Court of the State of Texas erred in finding and holding that the state of Texas could by statute (viz: Article 5545 of the Revised Civil Statutes, 1925, of the State of Texas) authorize, or confer jurisdiction upon, the courts of Texas to change the terms, or delete the clear provisions, of a contract of insurance made and to be performed in Mexico, insuring a vessel located in Mexico, and valid under the laws of Mexico, which contract, when made, was between two parties neither of whom was a citizen or resident of Texas; because such statute is invalid as repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States in that it deprives the appellants of their property without due process of law and denies to them the equal protection of the laws in violation of the said Fourteenth Amendment of the Constitution of the United States.

3. That the Supreme Court of the State of Texas erred in applying and enforcing Article 5545 of the Revised Civil Statutes, 1925, of the State of Texas, being a state statute of limitations of general scope, against the express terms of the contract of insurance made between C. J. Dick and Compania General Anglo-Mexicana de Seguros, S. A., which contract was validly made in Mexico, covered a vessel located in Mexico, and was to be performed outside of the State of Texas; because the said statute as so ap- [fol. 259] plied and enforced is invalid as repugnant to Paragraph 1 of Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the said contract in violation of the said article of the Constitution of the United States.

4. That the Supreme Court of the State of Texas erred in applying and enforcing Article 5545 of the Revised Civil Statutes, 1925, of the State of Texas, being a state

statute of limitations of general scope, against the express terms of the contract of insurance made between C. J. Dick and Compania General Anglo-Mexicana de Seguros, S. A., which contract was validly made in Mexico, covered a vessel located in Mexico, and was to be performed outside of the State of Texas; because the said statute as so applied and enforced is invalid as repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States, in that it deprives the appellants of their property without due process of law and denies to them the equal protection of the laws in violation of the said Fourteenth Amendment of the Constitution of the United States.

5. That the Supreme Court of the State of Texas erred in holding that the State of Texas by statute providing for garnishee process could constitutionally acquire jurisdiction over the appellants, The Home Insurance Company and Franklin Fire Insurance Company, corporations of the State of New York, for the adjudication of the liability of those appellants to Compania General Anglo-Mexicana de Seguros, S. A. under executory contracts of reinsurance, made and to be performed in Mexico and relating exclusively to property permanently situated in [fol. 260] Mexico, such contracts not having been entered into the course of the transaction of business in Texas by any insurance company party thereto; because such statute deprives the appellants, The Home Insurance Company and Franklin Fire Insurance Company, corporations of the State of New York, of their property without due process of law in violation of Section 1 of Article XIV of the Amendments of the Constitution of the United States.

6. That the Supreme Court of the State of Texas erred in holding that the State of Texas could, by statute providing for garnishee process, create a legal interest or privity in such contracts of reinsurance in favor of C. J. Dick, a citizen of the State of Texas, appellee herein, so that the judicial process of the courts of Texas might be used to adjudicate herein the liability of Compania General Anglo-Mexicana de Seguros, S. A. to the appellee, a citizen of Texas, under an insurance contract between those parties, and in addition adjudicate herein the liability of the appellants, The Home Insurance Company and Franklin Fire Insurance Company, New York corporations, to Compania

General Anglo-Mexicana de Seguros, S. A. under said reinsurance contracts, and upon such double adjudications herein satisfy the first of such liabilities out of property which might be found in the control of agents of the New York insurance companies in Texas; because such statute deprives the appellants, New York insurance companies, of their property without due process of law in violation of Section 1 of Article XIV of the Amendments of the Constitution of the United States.

[fol. 261] And the appellants further state that only the following parts of the record as filed in this court need be printed by the clerk for the hearing of the case:

Title of paper	Record page
Caption of proceedings in the Supreme Court of the State of Texas	3
Plaintiff's original petition	5
Order of court appointing attorney to represent absent defendant cited by publication	7
Defendant's original answer	8
Plaintiff's general demurrer	11
Judgment, notice of appeal and allowing 90 days to file statement of facts and bills of exceptions	12
Findings of facts and conclusions of law	14
Appeal bond	17
Affidavit for garnishment	32
Order of court granting Texas & Gulf Steamship Company and Suderman & Young leave to intervene for their interest	33
Intervention of Texas & Gulf Steamship Company and Suderman & Young	33
Original answer of The Home Insurance Company	36
Original answer of Franklin Fire Insurance Company	38
Controverting affidavit of plaintiff, C. J. Dick	41
Controverting affidavit of plaintiff, C. J. Dick	43
Answer of garnishees to plaintiff's controverting plea	45
Plaintiff's general demurrer	48
Judgment, notice of appeal and allowing 90 days to file statement of facts and bills of exceptions	49
Findings of fact and conclusions of law	51

Title of paper	Record page
[fol. 262] Appeal bond of defendant, The Home Insurance Company	54
Appeal bond of defendant, Franklin Fire Insurance Company	61
Garnishees' assignments of error	69
Exhibit, insurance policy	91
Exhibit, insurance policy	94-106 inc.
Judgments of Court of Civil Appeals	176
Opinion of Court of Civil Appeals	178
Motion for rehearing of appellants	194
Order overruling motion	199
Petition for writ of error	200
Order refusing writ	219
Motion for rehearing of application for writ of error	220
Order granting motion for rehearing	224
Judgment of Supreme Court	225
Opinion of Supreme Court	226
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Petition for appeal	238
Order of the Chief Justice of Supreme Court of Texas granting appeal	247
Assignment of errors	248
Stipulation of counsel as to amount of supersedeas bond	251
Supersedeas bond on appeal to Supreme Court of the United States	252
Citation on appeal, together with waiver of service thereof	254
Certificate of clerk	256

New York, July 23, 1929.

David Rumsey, Counsel for Appellants.

[fols. 263 & 264] Service of a true copy of the above and foregoing is this day acknowledged.

July —, 1929.

—— ——, Counsel for C. J. Dick.

[fol. 265] Affidavit of Service

STATE OF NEW YORK,
County of New York, ss:

Mark W. Maclay, being duly sworn, deposes and says:

I am a partner of David Rumsey, the counsel for the appellants herein. I am a member of the bar of this Court.

This case was duly docketed in the Clerk's Office of this Court on July 11, 1929.

On the 23rd day of July, 1929, at 11:20 o'clock A. M. in time to reach the counsel for the appellees within the fifteen day period prescribed by paragraph 9 of Rule 13 of the Rules of this Court, I served the annexed statement of the points to be relied upon and the designation of the parts of the record to be printed upon Lockhart, Hughes & Lockhart, Esq., counsel for the appellees herein, by depositing a true copy thereof in the United States Mail at the branch post-office known as the Wall Street branch, [fols. 266 & 267] Borough of Manhattan, New York City, the same being one of the regular branch post-offices of the New York City General Post-Office, enclosed in a securely closed wrapper with the postage thereon prepaid and registered, addressed to said counsel at their office, Suite 718, American National Insurance Building, Galveston, Texas, that being the address designated by them in the last papers served by them herein.

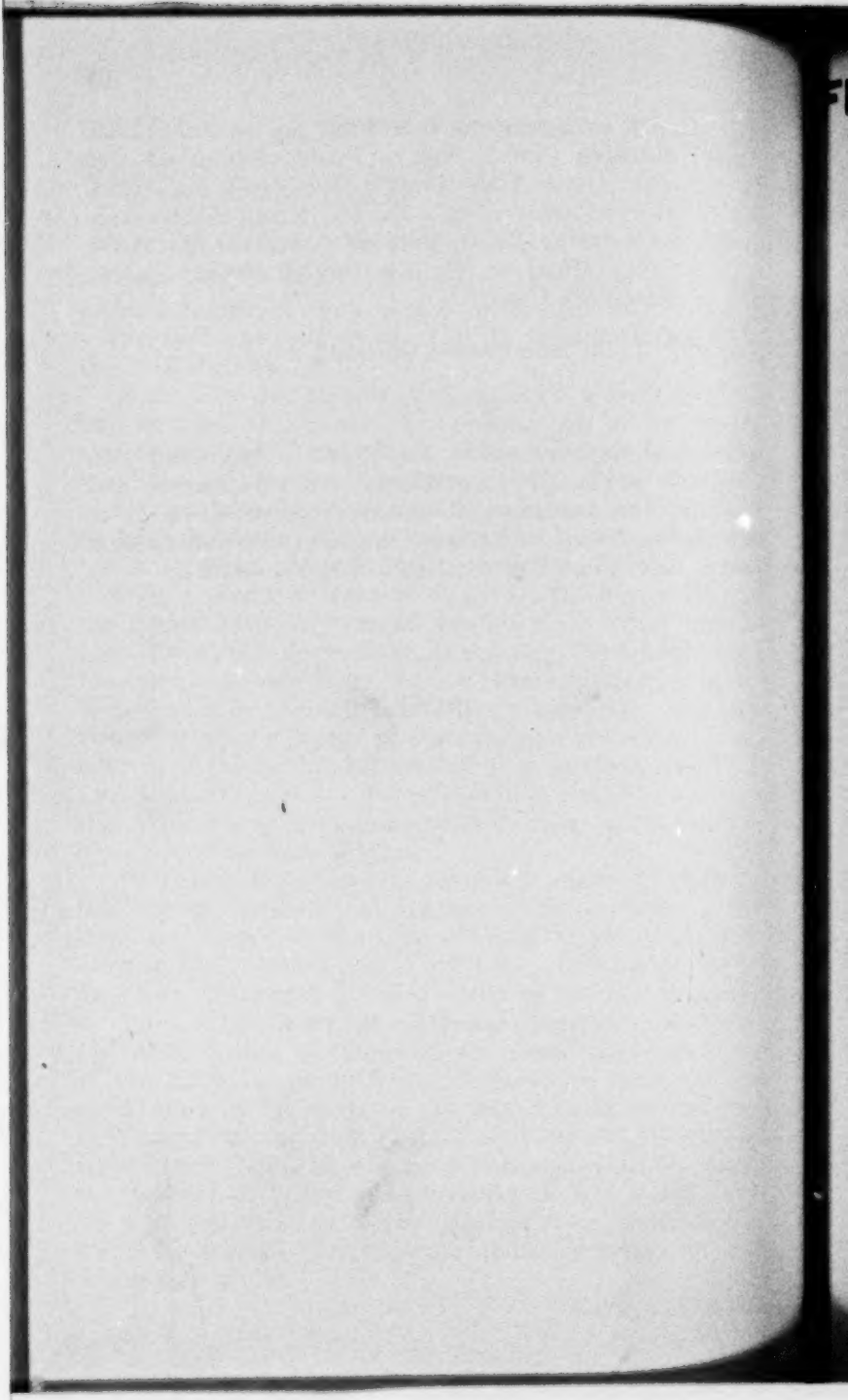
The reason that proof of service is made by affidavit, and not by admission of service by the counsel for the appellees herein, is that the office of David Rumsey is at #44 Wall Street, New York City, N. Y., and that of Lockhart, Hughes & Lockhart, counsel for the appellees, at Suite 718, American National Insurance Building, Galveston, Texas, and time did not permit the preparation of the statement of the points to be relied upon and the designation of the parts of the record to be printed, the mailing of the original thereof to Lockhart, Hughes & Lockhart, at Suite 718, American National Insurance Building, Galveston, Texas, and its return to said David Rumsey with admission of service, in time to be filed with this Court by July 26, 1929, the date of the expiration of said fifteen day period.

Mark W. Maclay.

Sworn to before me this 23rd day of July, 1929. Harding Cowan, Notary Public, New York Co., 223. New York County Register's No. 10214. Kings County Clerk's No. 65. Kings County Register's No. 1280. Commission expires March 30, 1931. (Seal of Harding Cowan, Notary Public, New York County.)

[fol. 268] [File endorsement omitted.]

Endorsed on cover: File No. 34,363. Texas Supreme Court. Term No. 232. The Home Insurance Company and Franklin Fire Insurance Company, appellants, vs. C. J. Dick, Texas & Gulf Steamship Company, and Suderman & Young, Inc. Filed July 11, 1929. File No. 34,363.



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FILED
AUG 9 1929
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1929

No. 232

THE HOME INSURANCE COMPANY AND FRANKLIN FIRE INSURANCE COMPANY,

Appellants,

against

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY, AND SUDERMAN AND YOUNG, INC.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS.

STATEMENT AS TO JURISDICTION ON APPEAL.

DAVID RUMSEY,
MARK W. MACLAY,
Counsel for Appellants.

The Evening Post Job Printing Office, Inc., 134 Fulton St., New York, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1929

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY,

Appellants,

AGAINST

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY, and SUDERMAN AND YOUNG, INC.

Statement as to Jurisdiction on Appeal

MAY IT PLEASE THE COURT:

The appellants in support of the jurisdiction of this court to review the above entitled cause on appeal respectfully represent:

A

STATUTORY PROVISIONS SUSTAINING JURISDICTION

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (United States Code, Title 28, Section 344), provides that Section 237(a) of the Judicial Code is amended to read in part as follows:

"Sec. 237(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the

validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Act of January 31, 1928, Chapter 14, 45 Stat. 54 (United States Code, Title 28, Section 861), provides as follows:

"* * * That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Sec. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: *Provided, however,* That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

The Act of April 26, 1928, Chapter 440, 45 Stat. 466 (United States Code, Title 28, Section 861 (b)) provides that Section 2 of the Act of January 31, 1928, be amended to read as follows:

"Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relat-

ing to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

The foregoing statutes are believed to sustain the jurisdiction of this court to review on appeal the final judgment herein of the Supreme Court of the State of Texas, the highest court of the state in which a decision in this suit could be had, where was drawn in question, on the ground of its being repugnant to the Constitution of the United States, and where the decision was in favor of, the validity of Article 5545 of the Revised Civil Statutes of Texas of 1925, which is set forth on page 6 of this Statement.

B

Date of Judgment and Date of Application for Appeal

The judgment sought to be reviewed was entered on the 10th day of April, 1929. (R. 225)*

A motion for rehearing was filed in the Supreme Court of the State of Texas on the 24th day of April, 1929. (R. 234-237) An order of that court denying the motion for rehearing was entered on the 12th day of June, 1929. (R. 238)

The application for appeal was presented to the Chief Justice of the Supreme Court of the State of Texas and allowed on June 14, 1929. (R. 238-247)

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*All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of the State of Texas and on file with the Clerk of this Court. The record has not yet been printed.

C

NATURE OF CASE AND RULING BELOW

On March 18, 1921, in Mexico, C. J. Dick procured a policy of insurance from the Compania General Anglo-Mexicana de Seguros, S. A., hereinafter called the Mexican Insurance Company, insuring the tugboat *R. Waverly* against loss by fire and other casualties in the amount of $35,000. On March 29, 1921, the Mexican Insurance Company entered into reinsurance agreements in Mexico with The Home Insurance Company and Franklin Fire Insurance Company, hereinafter called the American Reinsurance Companies, in the sum of $15,000 respectively.

The policy of insurance contained the following provision:

> "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs." Exhibit 2, (R. 101)

The vessel was alleged to have been destroyed by fire at Tampico, Mexico, on or about July 27, 1921. (R. 6, 41, 43)

On October 27, 1923, more than two years after the alleged fire, the insured, C. J. Dick, filed suit in the District Court of Galveston County, Texas, against the Mexican Insurance Company to recover a total loss under the Mexican policy. (R. 5-7)

The Mexican Insurance Company was a corporation incorporated under the laws of Mexico, had no agent in Texas, and was served by publication. The plaintiff, Dick, sued out ancillary writs of garnishment against the American Reinsurance Companies, each of which was a corporation organized and existing under the laws of the State of New York. The affidavit for garnishment was in

the Texas statutory form. Texas & Gulf Steamship Company and Suderman & Young, Inc. were allowed to intervene. The American Reinsurance Companies, as garnishees, answered, denying any indebtedness to the Mexican Insurance Company. The plaintiff, Dick, filed controverting affidavits alleging that each of the American Reinsurance Companies was indebted to the Mexican Insurance Company in the sum of $15,000 on the ground that shortly after the issuance of the policy by the Mexican Insurance Company it had reinsured its obligation assumed thereby with each of the American Reinsurance Companies to the extent of $15,000, and that hence each of the American Reinsurance Companies was indebted to the Mexican Insurance Company in that amount.

The American Reinsurance Companies answered, denying that they were indebted to the Mexican Insurance Company, and pleaded in bar of plaintiff's suit that the policy sued upon provided as follows:

> "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs." Exhibit 2, (R. 101)

The American Reinsurance Companies, as garnishees, further alleged that the said insurance policy was executed, was performable and was intended to be performed in Mexico, and was valid under certain provisions of the Commercial Code of the Republic of Mexico; that the clause above quoted was a valid defense to any suit brought to recover on said policy after the expiration of one year from the date on which the alleged damage occurred; and that this suit was not filed within one year. (R. 45-48)

To these answers of the garnishees, the plaintiff filed a general demurrer on the ground, among others, that Article 5545 of the Revised Civil Statutes of Texas of 1925 was a

valid statute of the State of Texas which prohibited entering into a contract containing a limitation of less than two years of the time within which suit might be brought. (R. 48-49) The text of the statute referred to in this demurrer is as follows:

> "Art. 5545. No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract, or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this State."

The District Court of Galveston County sustained the demurrer upon the ground that Article 5545 of the Revised Civil Statutes of Texas of 1925 was a valid statute, not in conflict with either Section 10 of Article I of the Constitution of the United States, or Article XIV of the Amendments of the Constitution of the United States. (R. 49-51, 186) Judgment was accordingly rendered by the said District Court of Galveston County in favor of the plaintiff for $17,587.50 and in favor of the intervenors for $19,087.50 against the Mexican Insurance Company; and in the garnishment proceeding, the main cause and the said garnishment proceeding having been tried together as one case, judgment was rendered in favor of the plaintiff and the intervenors against The Home Insurance Company for $18,337.50 and against Franklin Fire Insurance Company for the same amount. (R. 49-51)

The American Reinsurance Companies duly appealed from these judgments to the Court of Civil Appeals of Texas for the First Supreme Judicial District of Galveston and again drew in question the validity of said statute. That court affirmed the judgments of the court below and rendered its opinion in favor of the validity of this statute as against the claim of the American Reinsurance Companies that it was repugnant to Section 10 of Article I of the Con-

stitution of the United States and Article XIV of the Amendments of the Constitution of the United States. (R. 178-193) A motion by the American Reinsurance Companies for a rehearing was denied.

The American Reinsurance Companies then duly appealed to the Supreme Court of Texas and again drew in question the validity of the statute. That court affirmed the judgments of the District Court of Galveston County and of the Court of Civil Appeals, above referred to; held that Article 5545 of the Revised Civil Statutes of Texas of 1925 was not in violation of Section 10 of Article I of the Constitution of the United States or of Article XIV of the Amendments of the Constitution of the United States; and sustained its validity. (R. 226-233)

The American Reinsurance Companies' motion for rehearing in the Supreme Court of Texas was denied.

The American Reinsurance Companies' application for an appeal to this court was allowed by the Chief Justice of the Supreme Court of Texas on June 14, 1929. (R. 238-247)

The Supreme Court of Texas is the highest court of the State of Texas in which a decision in this suit can be had; and therein and in the Court of Civil Appeals and in the District Court these appellants drew in question the validity of the statute of the State of Texas, to wit; Article 5545 of the Revised Civil Statutes of Texas of 1925, on the ground of its being repugnant to the Constitution of the United States; and the decision of said courts was in favor of its validity.

D

Cases Believed to Sustain Jurisdiction

The following decisions of this court are believed to sustain jurisdiction of this appeal:

Kans. City So. Ry. v. *Road Imp. Dist. No. 6*, 1921, 256 U. S. 659-660;

Dahnke-Walker Co. v. *Bondurant*, 1921, 257 U. S. 282, 287-290.
Aetna Life Ins. Co. v. *Dunken*, 1924, 266 U. S. 389, 393, 400;
Fiske v. *Kansas*, 1927, 274 U. S. 380, 385;
Millsaps College v. *City of Jackson*, 1927, 275 U. S. 129, 132;
Saltonstall et al. v. *Saltonstall et al., Trustees*, 1928, 276 U. S. 260, 267-268.

We respectfully submit that this court has jurisdiction of this appeal by virtue of Section 237(a) of the Judicial Code as amended by the Act of February 13, 1925, and of the Act of January 31, 1928, as amended by the Act of April 26, 1928.

New York, August 6, 1929.

Respectfully submitted,

DAVID RUMSEY,
MARK W. MACLAY,
Counsel for Appellants.

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Office Supreme Court,
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SEP 12 1929
CHARLES ELMORE CRO
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1929

No. 282

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY, Petitioners

against

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY, and SUDERMAN AND YOUNG, INC.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

DAVID RUMSEY
MARK W. MACLAY
Counsel for Petitioners

FILE COPY

Office Supreme Court,
FILED
SEP 12 1929
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1929

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY, Petitioners

against

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY, and SUDERMAN AND YOUNG, INC.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

DAVID RUMSEY
MARK W. MACLAY
Counsel for Petitioners

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY, Petitioners,

against

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY, and SUDERMAN AND YOUNG, INC.

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of The Home Insurance Company and Franklin Fire Insurance Company respectfully shows to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a petition for a writ of certiorari to the Supreme Court of the State of Texas to review a judgment entered on the 10th day of April, 1929.

On March 18, 1921, in Mexico, C. J. Dick procured a policy of insurance from the Compania General Anglo-Mexicana de Seguros, S. A., hereinafter called the Mexi-

can Insurance Company, insuring the tugboat *R. Waverly* against loss by fire and other casualties in the amount of $35,000. On March 29, 1921, the Mexican Insurance Company entered into reinsurance agreements in Mexico with The Home Insurance Company and Franklin Fire Insurance Company, hereinafter called the American Reinsurance Companies, in the sum of $15,000 respectively.

The policy of insurance contained the following provision:

> "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs." Exhibit 2 (R. 101).*

The vessel was alleged to have been destroyed by fire at Tampico, Mexico, on or about July 27, 1921.

On October 27, 1923, more than two years after the alleged fire, the insured, C. J. Dick, filed suit in the District Court of Galveston County, Texas, against the Mexican Insurance Company to recover a total loss under the Mexican policy. (R. 5-7)

The Mexican Insurance Company was a corporation incorporated under the laws of Mexico, had no agent in Texas, and was served by publication. The plaintiff, Dick, sued out ancillary writs of garnishment against the American Reinsurance Companies, each of which was a corporation organized and existing under the laws of the State of New York. The affidavit for garnishment was in the Texas statutory form. Texas & Gulf Steamship Company and Suderman & Young, Inc., were allowed to intervene.

The American Reinsurance Companies, as garnishees, answered, denying any indebtedness to the Mexican Insur-

---

* All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of the State of Texas and on file with the Clerk of this Court. The record has not yet been printed.

ance Company. The plaintiff, Dick, filed controverting affidavits alleging that each of the American Reinsurance Companies was indebted to the Mexican Insurance Company in the sum of $15,000 on the ground that shortly after the issuance of the policy by the Mexican Insurance Company it had reinsured its obligation assumed thereby with each of the American Reinsurance Companies to the extent of $15,000, and that hence each of the American Reinsurance Companies was indebted to the Mexican Insurance Company in that amount.

The American Reinsurance Companies in their answers to the garnishment proceeding denied that they were indebted to the Mexican Insurance Company, and pleaded in bar of plaintiff's suit that it was not brought within one year from the date of damage, in accordance with the terms of the policy.

The American Reinsurance Companies, as garnishees, further alleged that the said insurance policy was executed in Mexico, was intended to be performed in Mexico, and was valid under certain provisions of the Commercial Code of the Republic of Mexico; that the clause above quoted was a valid defense to any suit brought to recover on said policy after the expiration of one year from the date on which the alleged damage occurred; and that this suit was not filed within one year. (R. 45-48)

To these answers of the garnishees, the plaintiff filed a general demurrer on the ground, among others, that Article 5545 of the Revised Civil Statutes of Texas of 1925 was a valid statute of the State of Texas which prohibited entering into a contract containing a limitation of less than two years of the time within which suit might be brought. The text of the statute referred to in this demurrer is as follows:

> "Art. 5545. No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract, or agreement, by reason whereof the time in which to sue thereon is

limited to a shorter period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this State."

The District Court of Galveston County sustained the demurrer upon the ground that Article 5545 of the Revised Civil Statutes of Texas of 1925 was a valid statute, not in conflict with either Section 10 of Article I of the Constitution of the United States, or Article XIV of the Amendments of the Constitution of the United States. Judgment was accordingly rendered by the said District Court of Galveston County in favor of the plaintiff for $17,587.50 and in favor of the intervenors for $19,087.50 against the Mexican Insurance Company; and in the garnishment proceeding, the main cause and the said garnishment proceeding having been tried together as one case, judgment was rendered in favor of the plaintiff and the intervenors against The Home Insurance Company for $18,337.50 and against Franklin Fire Insurance Company for the same amount. (R. 49-51)

The American Reinsurance Companies duly appealed from these judgments to the Court of Civil Appeals of Texas for the First Supreme Judicial District of Galveston. That court affirmed the judgments of the court below. (R. 178-193) The American Reinsurance Companies then duly appealed to the Supreme Court of Texas. That court affirmed the judgments of the District Court of Galveston County and of the Court of Civil Appeals, above referred to. (R. 226-233)

The American Reinsurance Companies' motion for rehearing in the Supreme Court of Texas was denied. (R. 238)

The American Reinsurance Companies' application for an appeal to this court was allowed by the Chief Justice of the Supreme Court of Texas on June 14, 1929. (R. 247) The case was docketed in this court on July 11, 1929, and a statement of jurisdiction on appeal was filed herein on August 10, 1929.

B

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) By the decision below a Texas statute prohibiting the entering into, and rendering invalid, any stipulation, contract or agreement limiting the time to sue thereon to a shorter period than two years was held to control a contract of insurance, entered into in a foreign country to be performed in a foreign country and between non-residents of Texas. This contract between the insured and the Mexican Insurance Company contained a clause by which the parties thereto mutually agreed to limit the time to bring suit to one year. Such a provision was a valid one under the laws of Mexico, where the contract was entered into.

The Texas court, by erroneously applying the local statute, violated Paragraph 1 of Section 10 of Article I of the Constitution of the United States by impairing the obligation of the contract herein, and also took from the petitioners their property without that due process of law guaranteed by Section 1 of Article XIV of the Amendments of the Constitution of the United States.

The question whether a local statute of limitations can be applied to a foreign contract specifically providing the time within which suit may be brought is a federal question of substance that has not heretofore been determined by this court. Moreover, an examination of the decisions of this court in analogous situations shows the decision of the Texas court to be in conflict with the principles set forth in such decisions. *Aetna Life Insurance Co.* v. *Dunken*, 1924, 266 U. S. 389; *New York Life Insurance Co.* v. *Dodge*, 1917, 246 U. S. 357.

(2) In the decision below the Texas court erroneously held that by garnishee process it could obtain jurisdiction of the petitioners herein, The Home Insurance Company and Franklin Fire Insurance Company. The court in its

opinion stated that the test of jurisdiction is whether or not the debtor (garnishee) is subject to suit at the hands of the creditors in the jurisdiction in which the garnishment is sought. It held as well settled that foreign insurance companies doing business by agents within a state are treated as residents and debts due from them to non-residents are garnishable in the state where they are doing business.

Irrespective of the correctness of such a test, the decision was erroneous in holding the test satisfied by the state of facts before it. The whole theory of the test is dependent upon there being an existing debt due which the creditor could pursue against the debtor (garnishee). In the instant case there could exist no such debt for as a condition precedent thereto there must have been a debt due from the Mexican Company, to C. J. Dick, the insured. The Texas court in holding such a debt existed relied on the decision of this court in *Allemannia Fire Insurance Co.* v. *Firemen's Insurance Co.*, 1907, 209 U. S. 326.

That decision is not controlling in the instant case. It holds that in the usual relationship of an insurer and reinsurer the debt arises upon the happening of the loss. That decision cannot apply where as an incident of the contract between the insurer and the insured, it is a part of such contract that no liability shall exist unless suit be commenced within one year from the date of loss, which was not done in this case. This clause of the contract, mutually agreed to by the parties, was a limit to the undertaking of the primary insurer and a condition precedent to the existence of any debt. By its erroneous decision in applying a non-applicable decision of this court, the petitioners herein were deprived of property without due process of law, in violation of the rights to them reserved by Section 1 of Article XIV of the Amendments of the Constitution of the United States.

(3) The result of the decision of the Texas court in granting the plaintiff below relief against the garnisheed

reinsurers, is to allow the insured relief directly against the reinsurance companies. Such a result has never been within the contemplation of the parties to reinsurance contracts and could only result from a privity of contract between the insured and the reinsurer which relationship this court has specifically held does not exist. *Morris & Co. v. Skandinavia Ins. Co.*, 1929, 279 U. S. 405 (Preliminary Print).

By thus allowing the plaintiff below a direct recovery against the petitioners herein, there existing no privity of contract between the parties, the petitioners were deprived of property without due process in violation of Section 1, Article XIV of the Amendments of the Constitution.

(4) The petitioners herein have qualified to transact business in every state in the United States and the same is true of the majority of other insurance companies who participate in the reinsurance business. The result of this decision is in effect to hold the reinsurance companies under a liability to the insured similar to that of a direct writing company at the whim of the insured in any state in which the reinsurance company has qualified to do business. The insured by this decision is permitted to recover against the reinsurer by suit in a state in which the direct writing company has not qualified to do business and has no assets beyond the contract of reinsurance, thus allowing the insured to obtain recovery that he could not have had but for the contract of reinsurance to which he was not a party. This is directly contrary to the contractual relations entered into in the contracts of reinsurance.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Texas, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 1235-5265, en-

titled *The Home Insurance Company (Compania General Anglo-Mexicana de Seguros S. A.), Plaintiff in Error,* v. *C. J. Dick et al., Defendants in Error,* and that the said judgment of the Supreme Court of the State of Texas may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

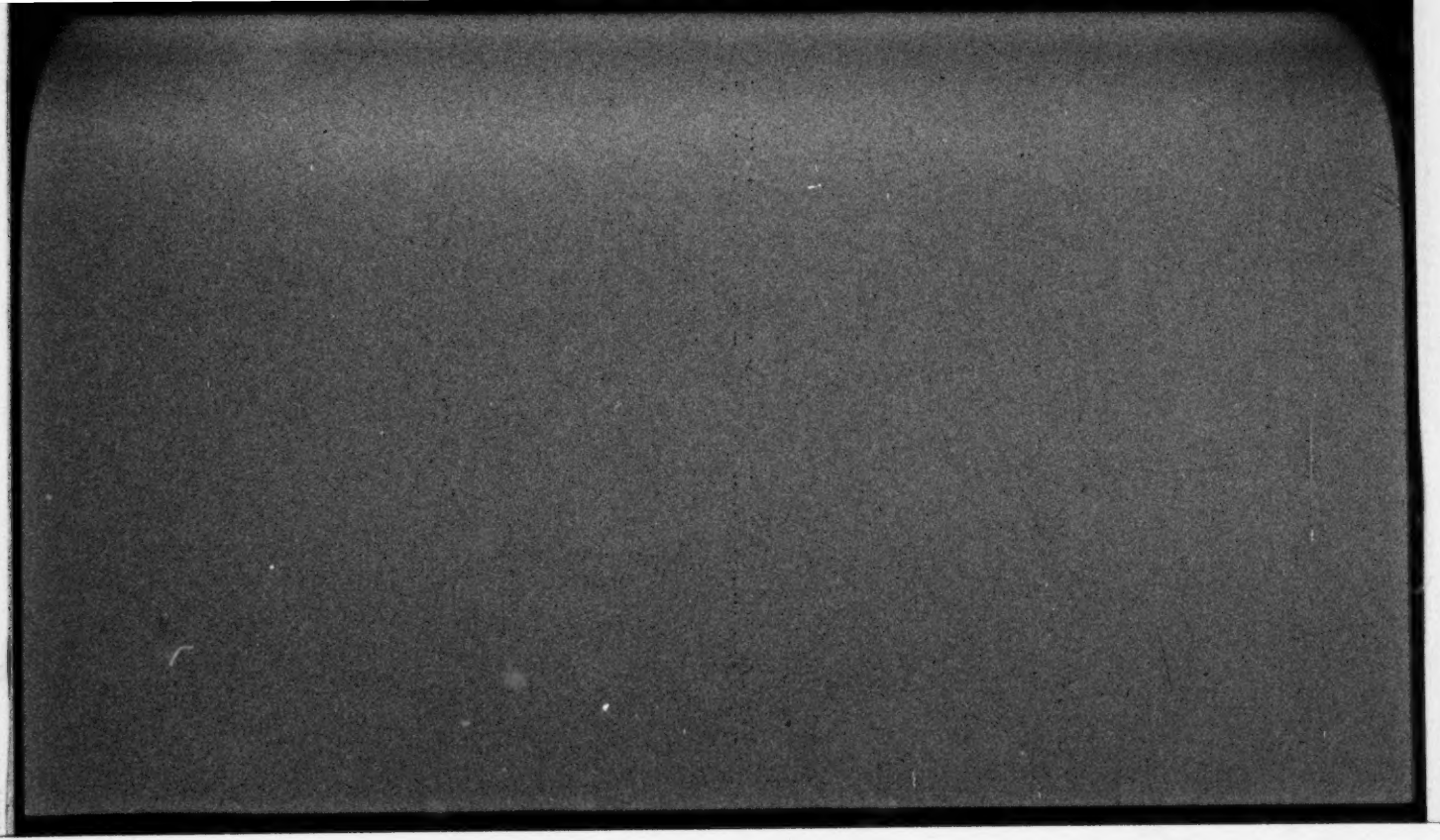
THE HOME INSURANCE COMPANY

and

FRANKLIN FIRE INSURANCE COMPANY

By DAVID RUMSEY
MARK W. MACLAY
Counsel for Petitioners

BRIEF IN SUPPORT OF WRIT FOR CERTIORARI



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY, Petitioners,

against

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY, and SUDERMAN AND YOUNG, INC.

BRIEF IN SUPPORT OF WRIT FOR CERTIORARI

I

THE OPINIONS OF THE COURT BELOW.

The opinion in the Supreme Court of the State of Texas is not officially reported but may be found in 15 S. W. (2nd) 1028. (R. 226-233)

The opinion in the Court of Civil Appeals of Texas is not officially reported but may be found in 8 S. W. (2nd) 354. (R. 178-193)

II

JURISDICTION.

1. The statutory provision believed to sustain the jurisdiction of this court is Judicial Code, §237 (b), as amended by the Act of February 13, 1925, Chapter 229, §1, 43 Stat. 937 (United States Code, Title 28, §344).

2. The date of the judgment to be reviewed is April 10, 1929. (R. 225)

A motion for rehearing was filed in the Supreme Court of the State of Texas on the 24th day of April, 1929. (R. 234-237) An order of that court denying the motion for rehearing was entered on the 12th day of June, 1929. (R. 238)

3. A full statement of the nature of the case and of the rulings below has been given under heading "A" in the petition.

The Supreme Court of Texas is the highest court of the State of Texas in which a decision in this suit can be had; and therein and in the Court of Civil Appeals and in the District Court these petitioners drew in question the validity of the statute of the State of Texas, to wit: Article 5545 of the Revised Civil Statutes of Texas of 1925, on the ground of its being repugnant to the Constitution of the United States.

III

Statement of the case.

A full statement of the case has been given under heading "A" in the petition and in the interest of brevity the statement is not repeated at this point.

IV

Specification of errors.

1. The Supreme Court of the State of Texas erred in finding and holding that Article 5545 of the Revised Civil Statutes of Texas of 1925 was applicable to the policy of insurance entered into in Mexico by the Mexican Insurance Company with the insured, C. J. Dick.

2. The Supreme Court of the State of Texas erred in finding and holding that the provision of the policy of

insurance limiting suit to a period of one year was not a substantial part of the contract of insurance but was a matter of remedy, in which the parties had no constitutional rights and governed by the *lex fori*.

3. The Supreme Court of the State of Texas erred in finding and holding that the garnishments which impounded funds of the American Reinsurance Companies were valid.

4. The Supreme Court of the State of Texas erred in finding and holding that there was a debt due from the American Reinsurance Companies to the Mexican Company.

5. The Supreme Court of the State of Texas erred in permitting the insured to recover judgment against the petitioners, the American Reinsurance Companies, although there was no privity of contract between the said insured and the Reinsurance Companies.

V

Argument.

Summary of Argument:

A. The decision of the Supreme Court of Texas in holding Article 5545 of the Revised Civil Statutes of Texas of 1925 applicable to the policy of insurance herein was repugnant to the Constitution of the United States.

B. The decision below is contrary to and in conflict with prior decisions of this court that the validity of a contract is determined by the law of the place where the contract is made and to be performed.

C. The decision of the State Court of Texas was contrary to and in conflict with a prior decision of this court holding that no privity exists between the insured and the reinsurer.

POINT A

THE DECISION OF THE SUPREME COURT OF TEXAS IN HOLDING ARTICLE 5545 OF THE REVISED CIVIL STATUTES OF TEXAS OF 1925 APPLICABLE TO THE POLICY OF INSURANCE HEREIN WAS REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

The rights of C. J. Dick, the insured, are contained in and are limited by the terms of the policy of insurance issued to him by the Mexican Insurance Company. It is uncontroverted that this policy of insurance contained a clause providing that no suit or demand should be entered for the collection of any claim under the policy unless such suit or demand were filed within one year of the date of the damage. It is also admitted by all parties that suit was not instituted until more than two years after the fire by which the alleged loss was incurred.

The provision in the policy thus limiting the time within which suit might be brought was valid under the law of Mexico, the place where the insurance contract was entered into, where the insured property was located and under which laws the rights and liabilities of the contracting parties were fixed.

The insured's rights, arising from the contract, their only source, to recovery for damage caused to him by reason of the risk insured, were expressly made subject to the valid condition that suit to recover such damages must be instituted within one year from the date of the loss. If such condition precedent were not complied with, the parties by their express language agreed that the insurer's liability should cease and the insured's right be lost.

The insured has not complied with the condition precedent to his rights that was validly imposed at their inception, but now, having lost such rights, seeks to have them revived and the scope of the insurer's liability extended beyond the bounds set forth in the instrument defining such liabilities by bringing suit in the Texas courts and invoking the protection of that state's local statute.

The court, in sustaining the insurer's contention and applying the statute to this policy, has impaired the obligation of the contract thereunder in violation of the Constitution and has further, by thus increasing the scope of the insurer's liability, deprived it, and in turn your petitioners, of property without due process of law, in violation of the Fourteenth Amendment to the Constitution.

This court decided as early as *Riddlesbarger* v. *Hartford Insurance Co.*, 1868, 7 Wall. 386, that the scope of liability of an insurer limited by an express stipulation as to the time of bringing suit, valid when and where made, could not be enlarged by a statutory provision lengthening the time to bring suit.

In that case a statute of Missouri allowed a party who suffered a non-suit to bring an action for the same cause within one year after the entry of such non-suit. The insured brought an action on a policy within one year after the loss, the period set forth in the policy; suffered a non-suit; and again sued after the lapse of the one year provided for by the policy but within a year of the non-suit. The plaintiff pleaded the Missouri statute. The defendant's demurrer to the complaint was sustained by the Circuit Court, and this court affirmed the judgment.

In its opinion, after holding the contractual limitation to be valid, the court, by Mr. Justice Field, said:

> "* * * the rights of the parties flow from the contract. That relieves them from the general limitations of the statute, and, as a consequence, from its exceptions also." P. 391
>
> * * * * * * *
>
> "We have no doubt of its validity. The commencement, therefore, of the present action within the period designated was a condition essential to the plaintiff's recovery and this condition was not affected by the fact that the action, which was dismissed, had been commenced within that period." P. 392

The Supreme Court of Texas by applying the Texas limitation statute to this contract deprived the petitioners of their property by excising from the contract one of its valid and, as said in the *Riddlesbarger* case (*supra*), "essential" conditions.

POINT B

THE DECISION BELOW IS CONTRARY TO AND IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT THAT THE VALIDITY OF A CONTRACT IS DETERMINED BY THE LAW OF THE PLACE WHERE THE CONTRACT IS MADE AND TO BE PERFORMED.

It has long been settled by repeated decisions of this court that matters concerning the validity of the terms of a contract are determined by the law of the place where the contract is entered into and is to be performed. *Scudder* v. *Union National Bank*, 1875, 91 U. S. 406, 412; *New York Life Insurance Co.* v. *Head*, 1913, 234 U. S. 149, 161. The contract of insurance on which the plaintiff Dick sued was entered into and was to be performed in the Republic of Mexico. The question of the validity of the limitation in the contract of the time within which suit must be brought should, therefore, be determined by the law of Mexico under which it was undoubtedly valid, entirely irrespective of the jurisdiction in which the plaintiff happened to sue. The Supreme Court of the State of Texas, however, entirely disregarded this fundamental principle and, in holding that the validity of this provision was to be determined by the laws of the forum instead of by the law of the place where the contract was entered into and was to be performed, decided this case in a way not in accord with applicable decisions of this court.

The decision of the Supreme Court of the State of Texas seems doubly erroneous when it is considered that in addition to holding the Mexican Company liable on the policy of insurance, it went further and held these petitioners, the Mexican Company's reinsurers, directly liable on this

reinsurance contract which was not entered into and was not to be performed in the State of Texas and did not contemplate any activity by either party to it in the State of Texas.

When it is considered that most of the important reinsurance companies do business in practically every state of the Union, the effect of the decision below concerns a large number of important interests beside the parties to this suit and the question here presented is believed to be one which warrants the consideration of this court.

The decision sought to be reviewed relied on the change of residence of the assured as the basis of application of the Texas statute. In a case precisely similar to the case at bar, *Union Central Life Insurance Co.* v. *Barnes,* 1917, 175 Ky. 364, the policy of insurance contained a stipulation that suit must be brought within one year. There, as here, the contract was valid where made. The insured moved to another jurisdiction and in reliance upon a statute in which the period of limitation was greater than one year, entered suit after the lapse of the limitation period set forth in the contract. The court held that the contractual limitation in a policy, valid where made, would be enforced by the courts of Kentucky although contrary to the limitation statute of that state; and said:

> "This Court was constrained to abide by the rules of comity, always recognized and enforced here, as elsewhere, rather than to impress its peculiar view upon a foreign contract subjected to litigation here * * *. The public policy of the State is not affected or infringed by the making of such a contract elsewhere, and under the rules of comity, we are bound to enforce a contract valid where made. Any other position would be at variance with all authority and entirely indefensible. *Under this view it is immaterial that appellee, when the cause of action accrued, and when the suit was filed, was a resident of this State.*" (Italics ours.)
>
> * * * * * * *
>
> "It is also argued for appellee, that the question of limitation is one of remedy, governed by the lex

fori rather than the lex loci contractus, and this would be true, if the question were one as to which statute of limitation should apply, whether of the state where the contract was made or the state where the remedy is sought to be enforced; but such is not the case here, since the statutes of limitations of the respective states are not involved, but only the validity of the contract itself." P. 367

Decisions to the same effect on this precise question have been made by the highest courts of Missouri and North Dakota. *Donlan* v. *Royal Neighbors of America*, 1906, 123 Mo. App. 147; *Travelers Ins. Co.* v. *California Ins. Co.*, 1890, 1 N. D. 151.

In the Missouri case, the court held that such a limitation of time within which suit might be brought is a qualification of the rights created under the contract and as such does not pertain to the remedy and if valid in Illinois where made is valid in Missouri where suit was instituted. In that case the court said:

"It is determined to be a provision which * * * imposes a restriction or qualification upon the rights vouchsafed in the contract entirely independent of the limitation statute * * * it operates in the nature of a condition precedent to forfeit the liability where suit is not instituted within the stipulated time." P. 156

In the North Dakota opinion, the following is the treatment by the court of this question:

"No question is made of the validity of the limitation clause in the policy. Such provisions are valid in the absence of a statute. This is settled law. Our statute relates to such provision (Sec. 3582) but it is conceded that the statute has no application to the facts of this case because the contract was a Minnesota contract insuring property there, made there, and to be performed there. The limitation was valid in that state and it in terms extinguished the right and did not merely bar the remedy * * *." P. 158

The precise point here involved has not been passed upon by this court. But in *Aetna Insurance Co.* v. *Dunken*, 1924, 266 U. S. 389, and *New York Life Insurance Co.* v. *Dodge*, 1917, 246 U. S. 357, this court has considered questions analogous to the case at bar. In both of these cases the validity of a statute of the state wherein suit was brought as applied to a contract of insurance entered into in another state was in question.

In the *Dunken* case (*supra*), this court refused to uphold such application of a Texas statute imposing a penalty for non-payment by the company within thirty days after demand to a contract entered into in Tennessee.

This court reversed the decision of the Missouri court in the *Dodge* case (*supra*) where that court had applied a statute of Missouri prohibiting forfeiture for non-payment of premium where a loan agreement, valid in New York where the contract was made, specifically provided for application of the total fund to the satisfaction of the loan agreement upon the failure of insured to meet the premiums.

The general rule in cases similar to the case at bar, where the validity of a stipulation limiting time within which suit may be brought upon a policy, when such policy is the subject of a suit in a jurisdiction other than that in which it was entered into, is stated in an authoritative treatise on insurance as follows:

> "It would seem to be the general rule that the validity of a stipulation as to the time of bringing suit is governed by the law of the place where the contract was made."
>
> 7 *Cooley's Briefs on Insurance*, 2nd Ed., 6808.

The question is discussed in 2 *May on Insurance*, 4th Ed., 1139, Sec. 478, where the following is found:

> "A condition in a policy of fire insurance that no action against the insurers for the recovery of any claim upon the policy shall be sustained, unless commenced within a certain period after the loss

shall have occurred, and that the lapse of this period shall be conclusive evidence against the validity of any claim asserted, if an action for its enforcement shall be subsequently commenced, is valid, and is generally held not to be in contravention of the policy of statutes of limitation. It stands upon the same grounds as other conditions precedent."

POINT C

THE DECISION OF THE SUPREME COURT OF TEXAS WAS CONTRARY TO AND IN CONFLICT WITH A PRIOR DECISION OF THIS COURT HOLDING THAT NO PRIVITY EXISTS BETWEEN THE INSURED AND THE REINSURER.

The Texas court obtained jurisdiction over the Mexican Insurance Company by publication and by writ of garnishment in the Texas statutory form. The Mexican company was not qualified . . do business in, and had no agent in Texas. Being a foreign corporation not doing business within the state, the jurisdiction depended upon the attaching of some of its assets within the state. The asset which the insurer garnisheed as the basis of his suit was the reinsurance obligation alleged to be due to the Mexican company by the American reinsurers in respect to this very loss. The existence of such a debt was dependent upon a loss suffered by the insured recoverable against the Mexican Insurance Company. The loss was one that was not recoverable against the Mexican Insurance Company in Mexico which was the place where it was doing business and had assets since the defense of the time limit in the policy was open to it. The Supreme Court of Texas nevertheless held that by reason of the contract of reinsurance, to which the insured was not a party, suit could be maintained in Texas where the Mexican company was not present and had no assets except the alleged debt arising out of such contract.

The result of such decision in allowing the insured thus to benefit by the contract of reinsurance between the

Mexican Insurance Company and the American Reinsurance Companies to which he was a stranger in effect gave a direct right to the insured and held him privy to such contract which is in direct conflict with the decision of this court in *Morris* v. *Skandinavia Ins. Co.*, 1929, 279 U. S. 405 (Preliminary Print).

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its discretionary powers to the end that a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of the State of Texas and finally reverse it.

New York, September 9, 1929.

Respectfully submitted,

DAVID RUMSEY,
MARK W. MACLAY,
Counsel for Petitioners.

APPELLANTS' BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1929

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY,

Appellants

vs.

C. J. DICK, TEXAS & GULF STEAMSHIP COMPANY, and SUDERMAN & YOUNG, INC.

BRIEF FOR APPELLANTS

DAVID RUMSEY
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Counsel for Appellants

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SUPREME COURT OF THE UNITED STATES

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY,

Appellants

against

C. J. DICK, TEXAS & GULF STEAMSHIP COMPANY, and SUDERMAN & YOUNG, INC.

October Term 1929
No. 232

BRIEF FOR APPELLANTS

I. PRELIMINARY STATEMENT

This is an appeal from a final judgment of the Supreme Court of the State of Texas entered on April 10, 1929 (R. 76).

The opinion in the Supreme Court of the State of Texas (R. 77-83) is not officially reported but may be found in 15 S. W. (2d) 1028. The opinion in the Court of Civil Appeals of Texas (R. 43-56) is not officially reported but may be found in 8 S. W. (2d) 354.

A motion for rehearing was denied by the Supre Court of Texas by order entered June 12, 1929 (R. 83

The petition for appeal (R. 84-90) was present to the Chief Justice of the Supreme Court of the Sta of Texas and allowed on June 14, 1929 (R. 90).

The case was docketed in this court on July 11, 19 (R. 99); and a statement as to jurisdiction on appe pursuant to the first paragraph of Rule 12, was filed August 9, 1929.

By this appeal the appellants seek to review the fi judgment herein of the Supreme Court of the State Texas, the highest court of the state in which a de sion in this suit could be had, where was drawn question the validity of Article 5545 of the Revi Civil Statutes of Texas, 1925, on the ground of being repugnant to the Constitution of the Uni States, and where the decision was in favor of validity of this statute, the text of which follows:

> "No person, firm, corporation, association combination of whatsoever kind shall enter i any stipulation, contract, or agreement, by son whereof the time in which to sue ther is limited to a shorter period than two ye And no stipulation, contract, or agreement any such shorter limitation in which to sue s ever be valid in this State."

The appellees filed an answer to the appellants' st ment as to jurisdiction and moved to dismiss this peal. On September 12, 1929, the appellants file

a motion in this case, a petition for a writ of certiorari and brief in support thereof.

On October 28, 1929, this court ordered that further consideration of the petition for a writ of certiorari herein and further consideration of the jurisdiction of this court be postponed to the hearing of the case on its merits.

II. STATEMENT OF THE CASE

A. Facts

On March 18, 1921, in Mexico, C. J. Dick procured a policy of insurance from the Compania General Anglo-Mexicana de Seguros, S. A., hereinafter called the Mexican Insurance Company, insuring the tugboat *R. Waverly* for one year against loss by fire and other casualties in the amount of $35,000 (R. 32-39).

On March 29, 1921, the Mexican Insurance Company entered into reinsurance agreements with the appellants, The Home Insurance Company and Franklin Fire Insurance Company, hereinafter called the American Reinsurance Companies. The position of the two reinsurance companies is substantially identical and each presumably accepted reinsurance of $15,000 upon receipt in New York of the declarations sent from Mexico on March 29, 1921. *Exhibits 3 and 4* (R. 9, 40).

The policy of insurance was limited to certain specified Mexican coastal waters and contained most of the clauses familiar in marine policies. The following

clauses of the policy are quoted in full because they play an important part in the decisions below and in the questions presented on this appeal:

> "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year, counted as from the date on which such damage occurs.
>
> * * * * * *
>
> "The present policy is subjected to the dispositions of the Commercial Code, in that it does not alter or modify the stipulations which that same contains" (R. 38).

The "dispositions of the Commercial Code" of the Republic of Mexico thus incorporated by reference were alleged (R. 5, 21) and admitted (R. 6, 23) to be as follows:

> "ARTICLE 1038. 'The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code.'
>
> "ARTICLE 1039. 'The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against same is given.'
>
> "ARTICLE 1043. 'One year shall prescribe actions derived from contracts of life insurance, sea and land.'"

There were various endorsements, the last one of which, dated Mexico, July 18, 1921, agrees:

> "that as from July 12th, 1921, all the interests, rights and obligations of the above mentioned Policy, are transferred to and solely vested in Mr. C. J. Dick as Lessee of the Insured Craft" (R. 39).

The vessel was alleged to have been destroyed by fire at Tampico, Mexico, on or about July 27, 1921 (R. 2, 9).

B. Proceedings Below

On October 27, 1923, more than two years after the alleged fire, the appellee C. J. Dick filed suit in the District Court of Galveston County, Texas, against the Mexican Insurance Company to recover a total loss under the Mexican policy, by petition alleging the making and transfer of the policy and the total loss of the vessel, and praying for citation by publication because the Mexican Insurance Company was a non-resident of Texas (R. 1-2).

The Mexican Insurance Company, being incorporated under the laws of Mexico and having no agent in Texas, was accordingly cited by publication and an answer on its behalf filed by attorneys appointed by the court (R. 3).

This answer filed January 14, 1927, without waiving any defects in service and without any appearance except by attorneys appointed by the court, demurred to

the petition (R. 3), denied all its allegations (R. 4), and pleaded specially the following defenses:

1. The suit was not filed within one year from the date of the damage, which is a complete defense to any suit brought on the policy because of the agreement in the policy that no suit should be begun unless filed within that time, which provision was valid under the laws of the Republic of Mexico, where the contract was made and was performable and was intended to be performed (R. 4).

2. The suit was not instituted within the period provided by certain provisions of the Commercial Code of the Republic of Mexico (which were incorporated by reference in the policy [R. 38]), which provisions barred completely the right of action upon the expiration of one year (R. 5).

3. The policy declared on was void because of misrepresentations by the plaintiff as to the value of the vessel (R. 5).

4. The vessel was not a total loss and notwithstanding such fact the vessel was abandoned in violation of the terms of the policy (R. 5).

On October 27, 1923, the same day on which suit was brought, the plaintiff sued out ancillary writs of garnishment against each of the American Reinsurance Companies by affidavit in the Texas statutory form alleging that the garnishees were "indebted to" or had "in their hands effects belonging to" the Mexican In-

surance Company. Each of the reinsurance companies was incorporated under the laws of New York, had a permit to do business within the State of Texas, and had a local agent in Texas (R. 11-12, 55, 77, 82).

On March 5, 1923, on grounds not now material, the appellees Texas & Gulf Steamship Company and Suderman & Young, Inc., were permitted to intervene in these proceedings (R. 12).

On December 3, 1923, the two American Reinsurance Companies filed substantially identical answers to the writ of garnishment, alleging that they were not indebted to the Mexican Insurance Company and did not have possession of any effects of the Mexican Insurance Company (R. 14-16).

Over seven months later, on July 5, 1924, the plaintiff, Dick, filed substantially identical controverting affidavits to the answers of the American reinsurers (R. 17-19), alleging the reinsurance and that upon the loss of the vessel and by reason of the contract of reinsurance there became due and payable from the garnishees to the defendant Mexican Company the sum of $15,000 each, and that each garnishee "has in its possession the sum of Fifteen Thousand Dollars belonging to the said defendant" Mexican Insurance Company (R. 18, 19).

On January 14, 1927, the appellants, the American Reinsurance Companies, filed a joint garnishees' answer to the plaintiff's controverting affidavits, alleging that by the contract of reinsurance the garnishees were obliged to indemnify the Mexican Insurance Company

against liability; that the garnishees were entitled to urge any defense to the garnishment that the defendant, Mexican Insurance Company, might urge in that suit; and that the Mexican Insurance Company was not liable to the plaintiff on the grounds set forth in the Mexican Insurance Company's answer, *supra*, p. 6 (R. 20-22).

The plaintiff filed a general demurrer on January 14, 1927, to the garnishees' answer in the garnishment proceedings and an identical demurrer on July 26, 1927, to the answer of the defendant in the original proceeding (R. 22, 6), chiefly on the grounds that the statute of Texas prohibits a contractual limitation of less than two years and that the conditions of the policy, alleged as defenses, are in violation of the public policy of the State of Texas (R. 6, 23).

The District Court of Galveston County on July 26, 1927, entered similar judgments in the original and ancillary suits, reciting that a jury had been waived and the parties had agreed to submit all matters in controversy to the court, and ordering a judgment in favor of the plaintiff for $17,587.50 and in favor of the intervenors for $19,087.50 against the Mexican Insurance Company, and in favor of the plaintiff and the intervenors against The Home Insurance Company for $18,337.50 and against Franklin Fire Insurance Company for the same amount (R. 7-8, 23-25). These judgments were rendered on Judge Dibrell's findings of fact and conclusions of law dated July 26, 1927 (R. 8-11, 25-27).

The Mexican Insurance Company and the American Reinsurance Companies duly appealed from these judgments to the Court of Civil Appeals of Texas for the First Supreme Judicial District (R. 8, 25).

Upon affirmance of both judgments on April 19, 1928 (R. 42), the Mexican Insurance Company and the American Reinsurance Companies duly obtained a writ of error from the Supreme Court of the State of Texas (R. 75-76), which on April 10, 1929, entered a judgment affirming the judgments of the Court of Civil Appeals and the District Court (R. 76). It is from that judgment of the Supreme Court that this appeal is taken.

C. Opinions Below

The Court of Civil Appeals in its opinion by George W. Graves, associate justice (R. 43-56), held:

1. Article 1043 of the Mexican Commercial Code prescribing actions not brought within one year, which was incorporated by reference in the policy, is not enforcible in Texas, the public policy of which state as declared by statute and judicial decision being against such period of limitation (R. 50-51).

2. The quoted provision of the policy affecting the remedy only was not a substantive part of the agreement (R. 51-52). The court drew the following distinction:

> "stipulations for the giving of notice of a claim for damages under stated conditions constitute

> a valuable right going to the substance of the contract itself, while those merely undertaking to fix a limitation of time within which suit must be brought thereon are referable only to the mode of its enforcement in the courts of the country; as to the former, the lex loci contractus governs, as to the latter, the lex fori;" (R. 52).

3. As constitutional rights are not affected by statute affecting the remedy only, Article 5545 of the Revised Civil Statutes of Texas, 1925, quoted above at page 2, prohibiting the making of the stipulations in this policy of insurance, neither impaired the obligation of the contract nor deprived the appellants of property without due process of law under Article I, Section 10, paragraph 1, and Amendment XIV, respectively, of the Constitution of the United States and was, therefore, valid (R. 52-53).

4. Unless the parties continue to reside in the jurisdiction where the contract is made, the law of the forum controls all questions of limitation arising under a foreign contract or statute even though under such foreign contract or statute the debt is extinguished and not merely the remedy barred (R. 53-54).

5. The validity of the one-year limitation on the right created by the policy under the laws of Mexico, where it was made, does not make any difference because the provision is contrary to the expressed public policy of Texas (R. 54).

6. The court's finding that the vessel was a total loss was sufficiently sustained by the evidence (R. 55).

7. Although the contracts of reinsurance were clearly of indemnity against liability, "debts arose under them between the reinsurers and the original insurer immediately upon the happening of the loss by fire under the policy sued on" (R. 55), and, therefore, the garnishees being subject to the court's jurisdiction through local agents, judgment was properly rendered against all the defendants.

The judgment of the Supreme Court of the State of Texas was entered on the recommendation of the Commission of Appeals, Section A, which held, per Richard Critz, judge:

1. The contractual and statutory limitations lawful in the Republic of Mexico are unenforcible in Texas because contrary to the statutory law and public policy of that state; and all questions of limitation, irrespective of whether contractual or statutory, are determined by the law of the forum (R. 79).

2. There is no difference or distinction to be drawn between statutes of limitation and statutes of prescription so far as the application of the rule that the law of the forum governs, so that it does not make any difference whether the lapse of one year extinguished the cause of action or merely barred the remedy (R. 80).

3. Irrespective of whether the provisions of the Mexican Code extinguished the cause of action or merely barred the remedy, they come within the pro-

hibition of Article 5545 of the Revised Civil Statutes of Texas, 1925, and this statute is valid and cannot be avoided by anything in the contract (R. 80).

4. The application of Article 5545 to a contract validly made under the laws of a foreign country is not unconstitutional because there is no constitutional right in matters which are not a substantial part of the contract, and the contractual provisions in question are not substantial parts of the policy of insurance but affect the remedy only (R. 81).

5. If both parties had remained in the Republic of Mexico "until the bar of the statutes of that country had actually and fully operated, a different question would be presented" (R. 81).

6. Judgment was properly given against the American Reinsurance Companies because valid garnishments "impounded funds in this state in the hands of the two garnishees" and because "a debt arises between the original insurer and the reinsurer immediately upon the happening of a loss under an insurance policy" (R. 82).

III. JURISDICTION OF THIS COURT

A. Appeal

As set forth in the statement as to jurisdiction on appeal filed herein on August 9, 1929, it is believed that this court has jurisdiction of this appeal by virtue of Section 237(a) of the Judicial Code as amended by

the Acts of February 13, 1925, January 31, 1928, and April 26, 1928, *U. S. Code, 1926, Ti. 28, §§ 344, 861, 861(a), 861(b);* because the Supreme Court of Texas is the highest court of the State of Texas in which a decision in this suit can be had, and therein and in the courts below these appellants drew in question the validity of a statute of the State of Texas, to wit, Article 5545 of the Revised Civil Statutes of Texas, 1925, on the ground that it was repugnant to the Constitution of the United States, and the decision of each of said courts was in favor of its validity.

As the appellees have filed a motion to dismiss the appeal, the attention of the court is directed to the decisions believed to sustain jurisdiction, set forth in the statement as to jurisdiction filed herein. Following these the appellees' contention in their motion and the cases cited in support thereof will be referred to briefly.

Kans. City So. Ry. v. *Road Imp. Dist. No. 6,* 1921, 256 U. S. 658, was a writ of error to the Supreme Court of Arkansas, which had affirmed a road improvement assessment in accordance with the provisions of a state statute. Plaintiff-in-error maintained that the assessment violated the Fourteenth Amendment. This court held that, the state court having declared that the statute authorized the assessment and that so construed it was a valid enactment, the validity of the statute had been adequately challenged and the cause was properly here on writ of error. Pp. 659-660.

Dahnke-Walker Co. v. *Bondurant,* 1921, 257 U. S. 282, was a writ of error to the Court of Appeals of

Kentucky, which affirmed a directed verdict for the defendant in a contract action. A Kentucky statute prescribing the conditions on which foreign corporations might do business in that state, with which the plaintiff had not complied, was the basis of the defense. The Kentucky court, while conceding the invalidity of the statute as applied to inter-state commerce, held the transaction in question was not inter-state commerce and hence the statute was valid and enforcible. This court held on the jurisdictional question that "as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error." P. 290. That part of the opinion by Mr. Justice Van Devanter dealing with jurisdiction completely disposes of the appellees' motion to dismiss. Pp. 287-290.

Cudahy Co. v. *Parramore*, 1923, 263 U. S. 418, was a writ of error to the Supreme Court of Utah which affirmed a workmen's compensation award. The Utah compensation act provided for payment of compensation to an employee for injury or death by accident "arising out of or in the course of his employment." This employee was killed on his way to work. This court held the motion of the defendant-in-error to dismiss the writ was clearly without substance because

"By this construction and application of the statute we are bound and the case must be con

sidered as though the statute had, in specific terms, provided for liability upon the precise facts hereinbefore recited. *Ward & Gow* v. *Krinsky*, 259 U. S. 503, 510. The question saved in the state court and presented here is whether the statute, as thus construed and applied, is valid under the provisions of the Fourteenth Amendment." P. 422.

Irrespective of the particular questions involved, on the basis of which the appellees seek to distinguish the cases cited by the appellants, the challenge of the jurisdiction in those cases was disposed of on the basis of the following test, within which it is submitted the present case clearly falls:

"A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under §237 of the Judicial Code. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 288. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented." *Fiske* v. *Kansas*, 1927, 274 U. S. 380, 385.

In their brief on jurisdiction, the appellees contend that the constitutional prohibition against a state impairing the obligation of contract refers only to legis-

lation enacted subsequent to the making of the contract in litigation. This is, of course, a correct statement in respect of statutes of the state in which a contract is made; but the principle underlying it is that the constitutional guaranty is directed against impairment "such as results from a subsequent exertion of the legislative power of the State," as stated in one of the cases cited by the appellees. *Cross Lake Club* v. *Louisiana,* 1912, 224 U. S. 632, 638.

The legislative power of Texas in the present case was exerted in respect of this contract at the time suit was brought and not before, because up to that time there was nothing upon which Texas could exert its legislative power, the contract being made and performed in Mexico and not concerned in any way with Texas.

The jurisdiction of this court does not depend on the form in which the legislative act is exerted, but rather upon its practical effect and operation as construed and applied by the state court of last resort. *Detroit United Ry.* v. *Michigan,* 1916, 242 U. S. 238, 247.

The prohibition of the Constitution against state legislation impairing the obligation of contract applies to all contracts wherever made and is not limited to contracts made within the bounds of the state whose legislation is drawn in question. *Western Nat. Bank* v. *Reckless,* 1899, 96 Fed. 70. In that case, a New Jersey statute was held to impair the obligation of a Kansas contract.

The point urged by the appellees, that since Article 5545 was enacted prior in point of time to the contract it cannot be contended to have impaired the obligation of contract as this could only be done by subsequent legislation, was considered in relation to foreign contracts valid where made by this court as early as *M'Millan* v. *M'Neill*, 1819, 4 Wheat. 209, 213, and *Ogden* v. *Saunders*, 1827, 12 Wheat. 213, 255. The opinion of Mr. Justice Washington in the latter case cited states that:

> "The principle alluded to was, that a state bankrupt law which impairs the obligation of a contract, is unconstitutional in its application to such contract. In that case, it is true, the contract preceded in order of time the act of assembly, under which the debtor was discharged, although it was not thought necessary to notice that circumstance in the opinion which was pronounced. The principle, however, remained, in the opinion of the court delivered in *M'Millan* v. *M'Neal*, unaffected by the circumstance that the law of Louisiana preceded a contract made in another State; since that law, having no extra-territorial force, never did at any time govern or affect the obligation of such contract. It could not, therefore, be correctly said to be prior to the contract, in reference to its obligation; since if, upon legal principles, it could affect the contract, that could not happen until the debtor became a citizen of Louisiana, and that was subsequent to the contract." P. 255.

With regard to *Aetna Life Ins. Co.* v. *Dunken*, 1924, 266 U. S. 389, more fully discussed hereafter, the appellees state at page 6 of their motion to dismiss that the question there raised was the endeavor of the state court to impress a subsequently passed penal statute of Texas upon a Tennessee contract. The contract in that case was entered into in December, 1910, p. 391, and the Texas statute which the Texas court held valid and applicable to this contract was approved March 22, 1909. *Gen. Laws, Texas, 1909, c. 108, §35.* This court did not base its decision either on the jurisdiction or on the merits on the ground that the legislation applied by the state court was enacted subsequent to the contract. In fact, neither the jurisdiction of this court nor the judgment of the court below were challenged upon the ground that the Texas statute was passed after the contract was entered into and a reference to the Texas statute shows that this was not the situation in fact. This court held that the judgment of the Texas court was erroneous in so far as it gave effect to the Texas statute, because the Texas statute cannot constitutionally be applied to a Tennessee contract, which is precisely the contention of the appellants in this case.

The only ground on which the distinction between prior and subsequent acts of the legislature as applied to foreign contracts might be maintained would be to give extra-territorial effect to the law of the forum. This was recognized and condemned by this court in *Aetna Life Ins. Co.* v. *Dunken*, 1924, 266 U. S. 389.

The appellees also attacked the jurisdiction on the ground that the only question involved is the public policy of the statute of Texas and the decision of its highest court construing such statute, and that the same does not involve the determination of a federal question. This contention is scarcely tenable by reason alone of the specific expression in the opinion of the Supreme Court of Texas that the unconstitutionality of Article 5545 was asserted by the appellants and that the statute was valid (R. 81).

Even assuming that Article 5545 is merely a pronouncement of the public policy of Texas and assuming that the construction of that statute by the Supreme Court of Texas is final, the cases cited by the appellees do not sustain their conclusion that the Texas court may determine the rights and obligations created by contract made and to be performed outside of Texas upon the basis of its local statute.

In the first case cited by the appellees, *Bond* v. *Hume*, 1917, 243 U. S. 15, a certified question was presented to this court whether the so-called Bucket Shop Law of Texas was so far a declaration of the public policy of that state as to prevent a federal court sitting in that state from entertaining a suit for breach of a contract dealing in cotton futures in New York, where it was valid. This court not only answered the certified question in the negative, but held that the state may refuse to enforce a valid foreign obligation only "where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law." P. 21.

The decision of this court in *Cross Lake Club* v. *Louisiana,* 1912, 224 U. S. 632, was that the decision below did not depend at all on the state statute in question and hence its validity was not drawn in question; and in the other cases cited by the appellees, the whole matter arose in one state so that the applicability of the Constitution depended on the effect of a subsequent statute on an earlier contract.

As opposed to the view taken by the appellees on the point of jurisdiction on the matter of applying a local law to a contract made and entered into in a foreign jurisdiction, this court in *Aetna Life Ins. Co.* v. *Dunken,* 1924, 266 U. S. 389, at page 394, stated, "The federal question presented arises from the ruling of the court that the Texas and not the Tennessee statute controls this contract."

The further contention of the appellees that the obligation of a contract is not impaired by a change in the remedy as long as an adequate remedy is saved the litigant, does not address itself to the contention of the appellants; for it is here urged in invoking the jurisdiction of the court not that a remedial right of the contract was altered, but that a substantial right of the contract to which both contracting parties had explicitly agreed, was impaired by the application of the Texas statute.

B. Certiorari

As a motion in this case, a petition for writ of certiorari has been filed under the provisions of the Judicial Code, Section 237(b), as amended by the Act of February 13, 1925. *U. S. Code, 1926, Ti. 28, §344.*

The application for a writ of certiorari is based on the following grounds:

1. The decision of the Supreme Court of Texas holding invalid the provisions in the policy limiting the time to sue thereon was erroneous, because Article 5545 of the Revised Civil Statutes of Texas, 1925, as construed and applied, violated paragraph 1 of Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments thereof.

2. The decision of the Supreme Court of Texas, holding invalid the provisions of the policy limiting the time to sue thereon because such provisions were contrary to the statute and public policy of the forum, is contrary to and in conflict with prior decisions of this court that the validity of a contract is determined by the law of the place where the contract is made and to be performed, and raises a federal question of substance.

3. The decision of the Supreme Court of Texas allowing a recovery against the American Reinsurance

Companies because at the time of the garnishment there was an existing debt due to the Mexican Insurance Company, whereby jurisdiction of the latter was obtained, on the authority of *Allemannia Ins. Co.* v. *Firemen's Ins. Co.*, 1908, 209 U. S. 326, was erroneous and was a misapplication of the doctrine of that case because the liability of the Mexican Insurance Company had not been established at the time of the garnishment and hence at that time a debt from the American Reinsurance Companies to the Mexican Insurance Company did not exist. The decision in this regard not only violates the constitutional rights of the American Reinsurance Companies under Section 1 of Article XIV of the Amendments of the Constitution of the United States, but also is in conflict with the decision of this court in *Morris & Co.* v. *Ins. Co.*, 1929, 279 U. S. 405, holding that no privity exists between the insured and the reinsurer.

4. The question of the liability of the American Reinsurance Companies is one of national importance and affects the entire business of reinsurance in the United States because the decision of the Supreme Court of Texas would permit the assured to hold the reinsurer directly liable by suing in any state where jurisdiction of the reinsurer could be obtained and where jurisdiction of the direct writing company could not be obtained by personal service.

IV. SPECIFICATION OF ERRORS

The appellants contend that by reason of each of the errors specified in the following paragraphs they have been deprived of their property without due process of law and have been deprived of the equal protection of the laws in violation of Section 1 of Article XIV of the Amendments of the Constitution of the United States; and that by reason of the errors specified in paragraphs 1 to 4 the State of Texas has impaired the obligation both of the contract of insurance and of their contracts of reinsurance in violation of paragraph 1 of Section 10 of Article I of the Constitution of the United States.

1. The Supreme Court of the State of Texas erroneously held Article 5545 of the Revised Civil Statutes of Texas, 1925, valid to change the terms and abrogate substantive provisions of the contract of insurance made and to be performed in Mexico, insuring a vessel located in Mexico and valid under the laws of Mexico.

2. The Supreme Court of Texas erroneously applied and enforced Article 5545 of the Revised Civil Statutes of Texas, 1925, as the law of the forum, against the express terms of the policy of insurance, valid by the laws of Mexico, where the contract was entered into and was to be performed.

3. The Supreme Court of the State of Texas erroneously held that jurisdiction had been acquired over the American Reinsurance Companies for the adjudication

of the liability of these appellants to the Mexican Insurance Company under contracts of reinsurance made and to be performed outside of Texas, relating exclusively to property permanently situated in Mexico, and not entered into in the course of the transaction of business in Texas by any of the insurance companies, party thereto.

4. The Supreme Court of the State of Texas erroneously held that the State of Texas could by means of statutes providing for garnishee process create a legal interest or property in the contracts of reinsurance in favor of the appellees herein, so as to permit the courts of Texas to adjudicate herein the liability of the Mexican Insurance Company to the assured and in addition adjudicate the liability of the American Reinsurance Companies to the Mexican Insurance Company, and upon such double adjudication to satisfy the first of such liabilities out of property found in the control of the Texas agents of the American Reinsurance Companies.

The relevant parts of the Constitution of the United States, relied on by the appellants, are as follows:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *." *Article I, Section 10, paragraph 1.*
>
> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Amendments, Article XIV, Section 1.*

V. ARGUMENT

Summary

The appellants contend that the limitation clause in the policy of insurance was a matter of substance and not of remedy; and that the rights of the parties were created by the contract, upon which the action is based, and were governed by the same instrument in so far as the rights created therein were limited ones. Being thus a matter of substantive contract and not of remedy, the rights are to be governed by the law of the place where the contract was made and was to be performed, that is Mexico. The case is not similar to one in which a statute of limitations is sought to be enforced but is analogous to one in which a right created by statute is controlled by the limitations contained therein.

The contrary public policy of a forum does not warrant a disregard of valid provisions of a contract, made and to be performed in another jurisdiction, when such provisions were neither criminal nor *mala in se*. The mere fact of the residence of the plaintiff within the forum does not warrant the application of the public policy of the forum to nullify a contract which was neither made nor to be performed within its jurisdiction.

The Texas courts, by holding the Texas statute here in question valid and applicable to the policy of insurance, have impaired the obligation of contract under the policy of insurance by impairing the means of enforcing its valid provisions. By giving extraterritorial

effect to the law of the forum and thus abrogating a valid defense to an action upon the policy of insurance, the Texas courts have deprived the appellants of property without due process of law, in violation of the Constitution of the United States.

The judgment of the Texas courts against the American Reinsurance Companies deprived them of property without due process of law in violation of the Constitution of the United States, as it was rendered without jurisdiction over these appellants. The Texas courts' jurisdiction in the garnishment proceeding was dependent upon the existence within the state of a debt, to form the basis for such an action *in rem*. No debt was owing by the American Reinsurance Companies to the Mexican Insurance Company at the time of the garnishment proceeding. Even though a debt had been owing, it was not a *res* within the jurisdiction of the Texas courts, so as to be the basis of jurisdiction in a garnishment proceeding.

FIRST POINT

THE "LIMITATION" CLAUSE IN THE POLICY WAS A MEASURE OF THE APPELLEES' RIGHTS THEREUNDER AND OF THE CORRELATIVE OBLIGATIONS OF THE MEXICAN INSURANCE COMPANY. IT WAS, THEREFORE, A SUBSTANTIVE PART OF THE CONTRACT, NOT MERELY A MATTER OF REMEDY.

By the terms of the contract the appellees' right was not to unconditional payment of a claimed loss but

only to payment of a contested loss if sued for within one year. Correlatively the Mexican Company's obligation to the appellees was not to pay any loss claim but to pay a loss claim if established in a suit begun within a year. The beginning of suit as provided for in the contract was thus by agreement of the parties made a factor for the measurement of the right of one party and the obligation of the other. It follows that the obliteration of the clause from the contract which has been effected by the decisions of the courts below constitutes an extension of the insurance company's obligation and the creation of a new right in the appellees, not provided in the contract.

It is difficult to understand the reasoning of the Texas Court of Civil Appeals in this case, affirmed by the Supreme Court, wherein a distinction is drawn between a stipulation limiting the time within which suit must be brought, held to be a matter of remedy only, and a stipulation limiting the conditions under which a notice of claim for damages must be given, held to constitute "a valuable right going to the substance of the contract itself" (R. 52). Stipulations of each type are inserted in contracts of carriage and insurance for similar reasons, namely, the absolute necessity of knowing without delay the nature and seriousness of claims and suits in order that timely investigation may be made, the question of liability reviewed while the facts are available and suitable defenses considered. It is of the utmost importance for an insurance company to know whether a contested claim is

going to be pressed seriously. The present case is a striking illustration of this. Substantial defenses to this cause of action relating to misrepresentation and abandonment for constructive total loss were alleged. These defenses were held by the trial court not to have been made out. It is quite possible that the insurer might have been able to produce the necessary evidence to make good these defenses if suit had been brought within one year as required by the policy.

This court has described the importance of such provisions as follows:

> "It is clearly for the interest of insurance companies that the extent of losses sustained by them should be speedily ascertained, and it is equally for the interest of the assured that the loss should be speedily adjusted and paid. The conditions in policies requiring notice of the loss to be given, and proofs of the amount to be furnished the insurers within certain prescribed periods, must be strictly complied with to enable the assured to recover. And it is not perceived that the condition under consideration stands upon any different footing. The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. And it is not an unreasonable term that in case of a controversy upon a loss resort shall be had by the assured to the proper tribunal, whilst the transaction is recent, and the proofs respecting it are accessible." *Riddlesbarger* v. *Hartford Insurance Co.*, 1868, 7 Wall. 386, 390.

Both of the Texas appellate courts have construed Article 5545, Revised Civil Statutes, 1925, as providing for extraterritorial operation and effect. Both of said courts have then held that the statute so construed, is constitutional. The theory underlying both decisions is that questions of remedy only are involved. Upon this premise both courts have concluded that the reason constitutional rights are not violated is because neither the contract obligation which is impaired nor the property right of which the appellees have been deprived are substantive in character (R. 51-52, 80, 81).

Appellants do not question the soundness of the constitutional principle established by the cases cited by the Texas courts but they do contend that the courts below not only confused the criteria of substance and remedy but also failed to distinguish between rights created by contract and those created by statute.

Both courts treated the limitation provision in the contract of insurance as if it gave rise to no different constitutional rights than the statutory limitations contained in the Mexican Code. Neither court apparently gave any consideration to the view that the limitation clause in the insurance contract was a factor for measuring the rights and obligations of the parties to the contract and that the expiration of the contract limitation (without commencement of suit for a claimed loss) had the agreed effect of extinguishing the right of recovery under the contract.

A. *A limitation on a right created by contract, valid where made, is a substantive part of the contract and is not analogous to a general statute of limitation affecting remedy only.*

Exceptions to statutory limitations suspending their operation express a public policy in mitigating the severity of restrictions imposed by law. Such policy is not involved where the limitation is contractual and voluntary. Where a limitation is expressed in the contract, it is controlling if valid where the contract is made. Thus a clause restricting the time within which an action on an insurance policy may be brought is not subject to the express or common law exceptions to the statute of limitations. *Riddlesbarger* v. *Hartford Insurance Co.*, 1868, 7 Wall. 386; *Semmes* v. *Hartford Insurance Co.*, 1871, 13 Wall. 158; *Guthrie* v. *Indemnity Assn.*, 1899, 101 Tenn. 643; *Mead* v. *Insurance Co.*, 1904, 68 Kan. 432; *Suggs* v. *Insurance Co.*, 1888, 71 Tex. 579.

In *Riddlesbarger* v. *Hartford Insurance Co., supra*, a fire insurance policy contained a provision that no suit should be brought unless within one year after the occurrence of the loss or damage. A suit was brought within a year and was non-suited by the plaintiff. Relying on a statute of Missouri where the suit was brought, providing that if a plaintiff suffer a non-suit he may commence a new action within one year therefrom, the plaintiff brought a second suit. This court held that the limitation in the contract was a good defense be-

cause "the contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses." P. 390. This court further held that it could not insert an exception covering the present situation, even with the assistance of the statute, without changing the contract, p. 391, and concluded that:

> "The commencement, therefore, of the present action within the period designated was a condition essential to the plaintiff's recovery; and this condition was not affected by the fact that the action, which was dismissed, had been commenced within that period." P. 392.

It is particularly to be noted that the statutory provision relied on in that case was one extending the time within which an action might be brought and was in the nature of an exception to a general statute of limitations; that such statutory extension was relied on as invalidating a limitation in the contract; and that the court specifically held that such statutory extension of the period generally limited did not invalidate the contract, which was a voluntary arrangement, before entering into which the insurers had the right to designate the terms upon which they would be responsible for losses.

Statutes of limitation being imposed by law are suspended where a disability imposed by law intervenes, so that the period of limitation is increased to the extent of the disability. The reason for this doctrine does not apply, however, to a contract limitation of time which

is not susceptible of enlargement by a disability. *Semmes* v. *Hartford Insurance Co., supra.*

In that case while there were other points involved, this court held that a contract limitation of twelve months within which to bring suit does not open and expand itself so as to receive within it a period of disability created by the Civil War. This court distinguished a contract limitation from a statutory limitation on the ground that a court has no right to construe a one-year limitation into a number of days equal to one year to be made up of days in an extended period in which the plaintiff could lawfully have commenced his action. P. 161.

In *Suggs* v. *Insurance Co.,* 1888, 71 Tex. 579, a limitation of one year in a life insurance policy was held a good defense although the plaintiffs were minors and could not have sued within the time limit. The Supreme Court of Texas held:

> "The validity of the provision in the policy sued upon in this case is not questioned, but it is insisted that the limitation, like that provided by the statute, does not run during the minority of the beneficiaries of the suit. This proposition, in our judgment, can not be maintained. The statute of limitations does not in any manner affect the question. The agreement is not merely to alter the rule of the statute by changing the time within which the action should be brought from four years to one year, leaving the limitation thus provided for subject to the statu-

tory conditions and exceptions. It makes no reference to the statute, but imposes a restriction upon the right of action entirely independent of it. It is said to differ from the statutory limitation in this, that it does not merely deny the remedy, but forfeits the liability when the suit is not brought within the stipulated time. (May on Ins., sec., 482, citing Williams v. Ins. Co., 20 Vt., 222.)

"The stipulation under consideration contains no exception in behalf of minors or other parties favored by the statute of limitations; and we see nothing in the nature of the contract to warrant us in engrafting an exception upon it by reason of mere analogy to these statutes. In this particular case the beneficiaries were but eleven and thirteen years old, respectively at the time the policy was issued. It was known to the assured that if a cause of action accrued to them at all, it must necessarily accrue during their minority. Under these circumstances, it is reasonable to presume that if it had been intended that the limitation contracted for should not run during their minority, it would have been so expressed in the policy." P. 581.

The incontestability clause in a life policy bars contest unless the insurer brings an affirmative action or files a defense within the time limited. *Humpston* v. *State Mut. Life Assur. Co.*, 1923, 148 Tenn. 439; *Mo. State Life Ins. Co.* v. *Cranford*, 1923, 161 Ark. 602.

The distinction between a statute of limitation affecting the remedy and a limitation in the contract creating the right itself is strikingly illustrated in *Williams* v. *Vermont Mutual Fire Ins. Co.*, 1848, 20 Vt. 222.

In that case a provision of the by-laws of the insurance company, constituting a part of the insurance contract, required that action must be brought at the next term of court after the directors disallowed a claim for loss in whole or in part. The directors disallowed the claim because one of the two persons insured had been accused of setting the premises on fire. Some time after "the next term of court" the directors paid to the innocent assured one-half the loss. It was contended that this was an acknowledgment or new promise which would open the limitation. The court held that the later payment could not have the effect of meeting the defense of the limitation because by the terms of the contract the liability itself was limited and "if the prescribed time be suffered to elapse without suit, there remains no longer a legal liability in any form." P. 231.

So in the present case, upon the expiration of one year there remained no longer any legal liability which might be revived by importation into Texas.

The view that the scope of the liability of an insurer is limited by an express stipulation, valid where made, as to the time of bringing suit as held in *Riddlesbarger* v. *Hartford Insurance Co.*, 1868, 7 Wall. 386, is also found in the leading case in New York State on that subject. *Williams* v. *Fire Association of Philadelphia*, 1907, 119 N. Y. App. Div. 573. In that case, in com-

menting upon the defense of such a provision to any action brought after the period covered by the statute, the court said:

> "By this clause in their contract the parties made compliance with the requirements in the policy and the commencement of the action within twelve months after the fire conditions precedent to the maintenance of the action." P. 574.

Decisions to the same effect on this precise question have been made by the highest courts of Missouri and North Dakota. *Dolan* v. *Royal Neighbors of America*, 1907, 123 Mo. App. 147; *Travelers Ins. Co.* v. *California Ins. Co.*, 1890, 1 N. D. 151.

In the Missouri case, the court held that such a limitation of time within which suit might be brought is a qualification of the rights created under the contract and as such does not pertain to the remedy and if valid in Illinois where made is valid in Missouri where suit was instituted. In that case the court said:

> "It is determined to be a provision which * * * imposes a restriction or qualification upon the rights vouchsafed in the contract entirely independent of the limitation statutes, * * * it operates in the nature of a condition precedent to forfeit the liability when suit is not instituted within the stipulated time." P. 156.

In *Travelers Ins. Co.* v. *California Ins. Co.*, 1890, 1 N. D. 151, a limitation on the time within which action might be brought on a policy, valid in the state where the contract was entered into, was held to extinguish the right and not merely bar the remedy.

B. *Similarly, where a right is created by a statute which includes a limitation upon the right, the expiration of the limitation has the effect not of merely barring the remedy but of extinguishing the right.*

The reason for the appellants' contention that the appellees' rights under the policy had no existence at the time suit was brought, namely, that the right created was a limited one by the terms of its creation, has been applied to new rights created by statute as well as to contract rights.

In *Davis* v. *Mills,* 1904, 194 U. S. 451, a Montana statute provided for certain liability upon the directors of corporations. The defendant became liable under this statute. Thereafter another statute limited actions to enforce certain statutory directors' liability which the court found included the liability of the defendant. In a suit in a United States District Court in the Second Circuit to enforce the Montana statutory liability against directors, the defendant set up the limitation. It was held that he might do so. Mr. Justice Holmes said at pages 453-454:

> "The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an *obligatio,* which, having been attached to the person by the law then having that person within its power, will be treated by other countries as accompanying the person when brought before their courts. But, as the source of the obligation is the foreign law, the defendant, generally

speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. *Slater* v. *Mexican National Railroad,* 194 U. S. 120. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure and as belonging to the *lex fori,* as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg,* 119 U. S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

The Harrisburg, 1886, 119 U. S. 199, cited by Mr. Justice Holmes, is an example of the familiar principle that where a death statute creating a right to recover for wrongful death includes a limit of time within

which suit thereunder must be brought, the right is extinguished upon the expiration of that time. The basis of this principle was thus stated by this court:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded." P. 214.

Cf. *Phillips* v. *Grand Trunk Ry.*, 1915, 236 U. S. 662.

If the Texas courts take jurisdiction to enforce the policy, the right created by it must be taken "subject to the limitations which have been made a part of its existence."

SECOND POINT

A SUBSTANTIVE PROVISION OF A CONTRACT, VALID BY THE LAW OF THE PLACE WHERE THE CONTRACT IS MADE AND IS TO BE PERFORMED, CREATES A RIGHT OF PROPERTY ENFORCIBLE IN ANOTHER JURISDICTION, EVEN THOUGH THE LAW OF THE FORUM PROHIBITS SUCH A PROVISION.

Both of the courts below took the position that Article 5545 of the Revised Civil Statutes of Texas, 1925, was declaratory of the public policy of Texas and that as this statute prohibited contractual provisions, such as those in suit, limiting the right to sue, the validity of the provisions of the Mexican Insurance Company's policy under the law of the place where the contract was made did not make any difference. The Supreme Court of Texas held in addition that the limitation might have been good in Texas if both parties had remained in the Republic of Mexico until the expiration of a year after the occurrence of the loss (R. 81).

The general rule is that "the validity of a stipulation as to the time of bringing suit is governed by the law of the place where the contract was made." 7 Cooley, *Briefs on Insurance*, 2nd Ed., 6808. Cf. 2 May, *Insurance*, 4th Ed., 1139, §478.

According to the fundamental territorial theory of Anglo-Saxon law, the only sovereign which has jurisdiction to create legal obligations is the sovereign which has power over the parties and their acts. In the case

of a contract the only sovereign having power to create legal obligations out of the acts done by the parties to the contract is the sovereign of the place where they act, namely, the place where the contract was entered into. Hence, validity is determined by that law. *Scudder* v. *Union National Bank*, 1875, 91 U. S. 406. The only sovereign which has jurisdiction to create a status is the sovereign having jurisdiction over the parties to the status.

This general rule applies to insurance contracts. *Equitable Life Society* v. *Clements*, 1891, 140 U. S. 226; *Northwestern Life Ins. Co.* v. *McCue*, 1912, 223 U. S. 234. The apparent exception in the case of insurance benefit certificates issued by fraternal organizations is due to the fact that in addition to the contract a relation or status is created, of which the contract is an incident. The validity of such a contract as an incident of the status is determined by the law of the domicile, which in the case of such fraternal organizations is the place where the corporation is incorporated. *Royal Arcanum* v. *Green*, 1915, 237 U. S. 531, 542; *Modern Woodmen* v. *Mixer*, 1925, 267 U. S. 544.

In either case, once the validity of the contract is determined, its obligation will be enforced even though the law of the particular forum in which suit happens to be brought is contrary and even though the contractual provision is contrary to the public policy of that forum. *Loucks* v. *Standard Oil Co.*, 1918, 224 N. Y. 99.

In that case Judge Cardozo said with respect to the enforcement of a right valid where created:

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal." P. 111.
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> * * * * * *
>
> "The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained." P. 113.

In *N. Y. Life Ins. Co.* v. *Head*, 1914, 234 U. S. 149, a suit was brought in the Missouri state court to recover the full amount of a life insurance policy which had been settled in accordance with the terms of a loan agreement and with the law of New York where the company was incorporated and where the loan agreement was made. At the time the policy was written a Missouri statute required the insurer to apply a certain part of the accumulated surplus for the payment of temporary insurance. If this had been done, the amount would have been sufficient to extend the insurance in the full amount of the policy beyond the date of the death of the assured. The defense asserted the validity of the settlement in New York under the loan agreement and urged that the Missouri statute could not be applied without depriving the company of due process under the Fourteenth Amendment and impair-

ing the obligation of contract contrary to Article I, Section 10, of the Constitution of the United States.

The Supreme Court of Missouri in affirming judgment for the plaintiff held that the agreement and settlement made in New York were controlled by the Missouri statute and were, therefore, void; and that the Missouri statutes were declaratory of the public policy of the state and were, therefore, effective to annul all stipulations which offended the provisions of the statute.

This court in reversing the judgment said:

> "And this concession brings us to consider the second general inquiry which is the power of the State of Missouri to extend the operation of its statutes beyond its borders into the jurisdiction of other States, so as in such other States to destroy or impair the right of persons not citizens of Missouri to contract, although the contract could in no sense be operative in Missouri and although the contract was sanctioned by the law of the State where made. That is to say, the right of a State where a contract concerning a particular subject-matter not in its essence intrinsically and inherently local is once made within its borders not merely to legislate concerning acts done or agreements made within the State in the future concerning such original contract, but to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the State of original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the State where the contract was originally made." Pp. 160-161.

The Missouri Supreme Court held that as foreign insurance companies had no right to come into Missouri except in accordance with the terms of the permission given by the state, the limitations of the Missouri law apply to foreign corporations, deprive them of any power not enjoyed by domestic companies, and render void or inoperative any conditions in policies or contracts made by them inconsistent with the Missouri laws. With respect to this contention this court held that although in view of the power of a state over insurance, by which it might impose conditions as to business within the state which foreign corporations might do, a state may not thereby acquire the right to assert an authority beyond its borders which it cannot exercise consistently with the constitution.

In *Mut. Life Ins. Co. of New York* v. *Cohen*, 1900, 179 U. S. 262, suit was brought in the United States District Court for the District of Washington on a policy entered into in Montana. By the terms of the policy failure to pay the annual premium worked a forfeiture of all claims against the insurer, which was incorporated in New York, where a statute prohibited forfeiture for non-payment of premium. This court held that the New York statute did not control and that the forfeiture provision in the policy would be enforced in the Washington suit because it was valid under the law of Montana, the place where the contract was entered into. The court said:

> "Undoubtedly a foreign insurance company making a contract within the State of New York

would find that contract burdened by its [the statute's] provisions, and equally clear is it that such company making a contract in another State would be free from its limitations." P. 265.

In *Bond* v. *Hume*, 1917, 243 U. S. 15, suit was brought in the United States District Court for the Western District of Texas on a contract made in New York between a citizen of New York and a citizen of Texas for the sale of cotton for future delivery in accordance with the Exchange rules valid under the laws of New York, but contrary to a Texas statute. The Circuit Court of Appeals for the Fifth Circuit certified to this court the question whether the Texas Bucketshop Law or public policy therein declared, prevented the trial court from granting the relief which the parties would otherwise be entitled to have. This court answered this question in the negative, and held that the validity of the contract under the law of the place where it was entered into and executed "was not and could not be affected by the laws of the State of Texas, as in the nature of things such laws could have no extra-territorial operation." P. 20.

An earlier decision of this court, already discussed under the First Point, is to the same effect. *Davis* v. *Mills*, 1904, 194 U. S. 451.

Similarly, it was held in *Converse* v. *Hamilton*, 1912, 224 U. S. 243, that a right validly created by a Minnesota statute would be enforced in Wisconsin although contrary to the public policy of that state.

New York Life Ins. Co. v. *Dodge,* 1918, 246 U. S. 357, involved the validity of the terms of a loan agreement, made in New York, which were contrary to a Missouri statute, under circumstances similar to those in *N. Y. Life Ins. Co.* v. *Head,* 1914, 234 U. S. 149, *supra,* p. 41. The Missouri Supreme Court affirmed the judgment for the plaintiff and the case came to this court on writ of error.

This court held that the policy was a Missouri contract subject to the statutes of Missouri so far as valid and applicable; and that the loan contract was a separate agreement made in New York of a kind which no state by direct action may prohibit a citizen within her borders from making outside of them. In view of the Missouri statute there was no obligation on the company to make the loan and, hence, the loan contract actually consummated was a voluntary one which the company had not already obligated itself to make upon demand. After reviewing the power of Missouri to regulate the conditions on which a foreign insurance corporation might do business in Missouri, the court said:

> "Under the laws of New York, where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri legislature could not destroy or prevent a citizen within its borders from making beyond them by direct inhibition; and applying the principles accepted and enforced in *New York Life Insurance Co.* v. *Head,* we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the State

> and rendered ineffective through a license authorizing the insurance company there to do business. As construed and applied by the Springfield Court of Appeals, §7897 transcends the power of the State. To hold otherwise would permit destruction of the right—often of great value—freely to borrow money upon a policy from the issuing company at its home office and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment." Pp. 376-377.

The situation in the *Head* and *Dodge* cases and the position taken in each by the Missouri Supreme Court are strikingly similar in all essential particulars to the situation in the case at bar and the decision of the Supreme Court of Texas.

The principle has also been pointed out by the Court of Appeals of Kentucky in two similar cases: *Clarey* v. *Union Central Life Ins. Co.*, 1911, 143 Ky. 540; and *Union Central Life Ins. Co.* v. *Barnes*, 1917, 175 Ky. 364. In each of these cases a suit was brought on a life insurance policy providing that no action should be maintained after one year from the date of death of the assured. Such a provision was valid under the law of the state in which each policy was entered into but contrary to the public policy of Kentucky where suit was brought, where the statutory limitation was fifteen years. In each case the assured before his death moved into Kentucky. In both cases it was held that as the validity of the contracts is to be determined by the law of the place where it is entered into, the con-

tractual provision was valid and effective to defeat recovery.

In the later case, the court said:

> "* * * this court was constrained to abide by the rules of comity, always recognized and enforced here, as elsewhere, rather than to impress its peculiar views upon a foreign contract subjected to litigation here. * * * the public policy of the state is not affected or infringed by the making of such a contract elsewhere, and under the rules of comity, we are bound to enforce a contract valid where made. Any other position would be at variance with all authority and entirely indefensible. *Under this view it is immaterial that appellee, when the cause of action accrued, and when the suit was filed, was a resident of this state.*" (Italics ours.)
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> * * * * * *
>
> "It is also argued for appellee, that the question of limitation is one of remedy, governed by the *lex fori* rather than the *lex loci contractus*, and this would be true, if the question were one as to which statute of limitation should apply, whether of the state where the contract was made or of the state where the remedy is sought to be enforced; but such is not the case here, since the statutes of limitations of the respective states are not involved, but only the validity of the contract itself." P. 367.

C. J. Dick's residence in Texas at the time of the alleged loss has been urged as a reason for the application of the Texas law and both of the courts below

deemed this circumstance of importance (R. 53-54, 80, 81). The circumstance of Dick's residence, however, is entirely immaterial when it is considered that the party urging the application of the law of the forum was a resident of the jurisdiction of the forum at the time the contract was entered into in *Bond* v. *Hume*, 1917, 243 U. S. 15, *New York Life Ins. Co.* v. *Dodge*, 1918, 246 U. S. 357; and at the time of accrual of the right and also at the time suit was brought in *Bond* v. *Hume*, 1917, 243 U. S. 15, *New York Life Ins. Co.* v. *Dodge*, 1918, 246 U. S. 357, *Aetna Life Ins. Co.* v. *Dunken*, 1924, 266 U. S. 389, *Clarey* v. *Union Central Life Ins. Co.*, 1911, 143 Ky. 540, *Union Central Life Ins. Co.* v. *Barnes*, 1917, 175 Ky. 364. Among the cases cited in this Point the assured was a non-resident of the state where suit was brought only in *N. Y. Life Ins. Co.* v. *Head*, 1914, 234 U. S. 149, *Mut. Life Ins. Co. of New York* v. *Cohen*, 1900, 179 U. S. 262.

It is apparent from the cases cited by the courts below that the Supreme Court of Texas failed to distinguish between the effect on a contract of adverse public policy of the place where the contract was to be performed and adverse public policy of the law of the forum. Owing to the fact that suit is frequently brought in the courts of the jurisdiction where a contract is performed, it is usually not necessary to draw any distinction because it is well-settled that if the performance of a contract is against the public policy of the jurisdiction where it is to be performed, it will not be enforced. *Knott* v. *Botany Mills*, 1900, 179 U. S. 69; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 1889, 129 U. S. 397.

Thus the decision of this court in *Knott* v. *Botany Mills, supra,* was cited as authority for the proposition that a contractual provision contrary to the public policy of the forum will not be enforced.

In that case the principal question related to the construction of Sections 1 and 3 of the Harter Act and the application of that Act to voyages from foreign ports to the United States. The bill of lading contained a clause invalid under the Harter Act which had to do with the performance. The contract, being one of carriage from Buenos Aires to New York, was partly to be performed within the United States. The ground of the decision, holding that the Harter Act applied and that the negligence clause in the bill of lading would not be enforced, was that such provision was invalid by the law of the place of performance. It was not suggested and this court did not hold that the defense was not available because contrary to the law of the forum, although that was incidentally the fact, because the forum and the place of performance happened to be the same jurisdiction.

The distinction becomes clear upon examination of similar cases of ocean carriage raising the question of validity of bill of lading clauses, where the suit is brought in a jurisdiction other than that of performance.

A negligence clause in a bill of lading similar to that in question in *Knott* v. *Botany Mills, supra,* was upheld in two cases in the United States courts, where the voyage or any other part of the performance of the contract did not take place in the United States. *The*

Fri, C. C. A. 2nd, 1907, 154 Fed. 333, certiorari denied 210 U. S. 431; *The Miguel di Larrinaga*, 1914, 217 Fed. 678.

In *The Miguel di Larrinaga* the voyage was from Liverpool to Cuban ports and the bill of lading was thus entered into in England for performance in Cuba. The negligence clause was valid by the laws of England and Cuba, but plainly contrary to the Harter Act. In a suit on the bill of lading in the Southern District of New York, Judge Hough held the carrier entitled to assert the negligence clause in the bill of lading as a defense; because, as stated in the syllabus by the court, "A contract valid where made is valid everywhere unless contrary to the public policy of the place of performance; and the law of the forum is immaterial, if a contract is valid where made and where it is to be performed." P. 678.

In *The Fri, supra,* cargo was shipped from Carthagena, U. S. of Colombia, to Cienfuegos, Cuba, under shipping documents containing a negligence clause valid by the law of Colombia but contrary to the public policy of the forum as established by the Harter Act. The Circuit Court of Appeals for the Second Circuit held that by the decisions of the federal courts negligence clauses in a contract of carriage made in this country or made abroad and to be performed here are contrary to public policy; that the law of the place where a contract is made governs its nature, obligation and interpretation; and that a contract valid in the state where it is made will be enforced in a state by whose law it is invalid, even though the contract contravenes a statute

of the state in which suit is brought. The court further stated that none of the adjudications in the federal courts refused to enforce such a stipulation in cases where the contract of affreightment was lawful where made and when no part of it is to be performed in this country. The court concluded as follows:

> "We are unable to appreciate how a contract made in a country where it is valid, no part of which is to be performed in this country, and relating to the transportation of property on a foreign vessel on a voyage which does not include an American port, can be one which particularly concerns the public policy of the United States. When the parties to such a contract choose to resort to the courts of this country to enforce it, there seems to be no sound reason, as there certainly is no direct authority, for deciding that the contract shall not be enforced in substance and effect as they agreed." P. 338.

In *The Trinacria*, 1890, 42 Fed. 863, Judge Addison Brown held:

> "It is no part of the law or policy of this country to invalidate the contracts of parties lawfully made abroad, so far as respects performance there, or to apply our law to the consequences of such performance there, the acts being neither criminal, by our law, nor *mala in se*. It is a wholly different question whether the courts of this country should sustain contracts or stipulations, as regard acts performed and designed to be performed, either on the high seas or within the exclusive jurisdiction of this country, when such stipulations are by our law void on grounds of public policy." P. 864.

THIRD POINT

THE APPLICATION OF ARTICLE 5545 OF THE TEXAS REVISED CIVIL STATUTES, 1925, TO ABROGATE A VALID PROVISION IN A FOREIGN CONTRACT IMPAIRS THE OBLIGATION OF CONTRACT, DEPRIVES OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES EQUAL PROTECTION OF THE LAWS, CONTRARY TO THE CONSTITUTION OF THE UNITED STATES.

By applying its local statute to this contract the Supreme Court of Texas has treated the Legislature of the State of Texas as intending to legislate with regard to the rights of Dick and the Mexican Insurance Company, who entered into a transaction in Mexico, and also with regard to the rights of the Mexican Insurance Company and the reinsurers, who entered into a reinsurance contract in the State of New York.

Under the decision of the Supreme Court of Texas, Article 5545 R. C. S. Texas, 1925, is construed as if it read: "No person, firm or corporation, association or combination of whatsoever kind shall enter into, *either in this state or elsewhere,* any stipulation, contract or agreement *performable within or outside of this state* by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract or agreement *made either in this state or elsewhere, performable either here or elsewhere,* for any shorter limitation in which to sue shall ever be valid in this state."

The case must be considered as if the statute read thus. *Ward & Gow* v. *Krinsky*, 1922, 259 U. S. 503, 510; *Cudahy Co.* v. *Parramore*, 1923, 263 U. S. 418, 422.

But both the Mexican Insurance Company's and the reinsurers' rights were measured by the terms of the contracts which created them and after the expiration of one year the appellees' rights were gone. For the Texas court to apply its own statute and, as a necessary consequence of so doing, to refuse to recognize the existence of the defense pleaded is to give to the Texas statute a construction which would make it unconstitutional as bringing about a deprivation of property without due process.

Impairment of the obligation of contract forbidden by the Constitution has been defined in *Louisiana* v. *New Orleans*, 1880, 102 U. S. 203, 206-207:

> "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation."

The application of Article 5545 to the Mexican contract of insurance falls directly within the prohibition here defined. It denied the defendants' right to force the plaintiff to carry out his express agreement not to bring suit after one year from the date of the loss.

Such action by the Supreme Court of Texas is action by "a state" within the meaning of the constitutional prohibitions. *Ex parte Virginia*, 1879, 100 U. S. 339, 346-347; *Old Wayne Life Assn.* v. *McDonough*, 1907, 204 U. S. 8, 23.

While many of the cases already cited were decided upon the full faith and credit clause of the Constitution, the principle here involved goes much further, for a state cannot consistently with the Constitution of the United States destroy a contract right validly created in another jurisdiction. Such extraterritorial operation of a statute as was upheld by the Supreme Court of Texas has been condemned by this court in *N. Y. Life Ins. Co.* v. *Head*, 1914, 234 U. S. 149, where an attempt to extend to a valid contract made in another state regulatory insurance statutes of the forum, of a remedial nature was held a violation of the constitutional right in freedom of contract and a deprivation of property in contravention of the constitutional provisions guaranteeing due process. The facts have already been stated.

This court in its opinion of reversal said:

> "In other words, concretely speaking we must consider the validity of the loan agreement, that is, how far it was within the power of the State of Missouri to extend its authority into the State of New York and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making such loan agreement in New York simply because it modified a contract originally made in Missouri.

Such question, we think, admits of but one answer since it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound. The principle however lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause.

"It is illustrated as regards the right to freedom of contract by the ruling in *Allgeyer* v. *Louisiana*, 165 U. S. 578, and it finds expression in the decisions of this court affirmatively establishing that a State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power." Pp. 161-162.

The distinction that in the above case the insured was a non-resident of the state of the forum is unsound for in a latter case, *New York Life Ins. Co.* v. *Dodge*, 1918, 246 U. S. 357, under similar facts, the insured was a citizen of Missouri, the state of the forum, and this court again held unconstitutional the application of

the statute of the forum to a foreign contract valid where made.

In *Aetna Life Ins. Co.* v. *Dunken*, 1924, 266 U. S. 389, the defendant, a Connecticut insurance company, doing business in Texas, issued an insurance policy on the life of a citizen of Tennessee. The policy was for a seven-year term and provided that at the option of the insured it could be converted into a twenty payment life upon specified conditions. Through a Tennessee agent of the defendant the assured, who in the meantime had moved his residence to Texas, applied for a conversion in accordance with the conditions of the contract. The defendant sent the substituted policy to the Tennessee agent, who mailed it in Tennessee to the assured in Texas. Upon the death of the assured his representative demanded payment and sued the defendant in the Texas state court.

A Texas statute in force at the time the contract was entered into provided that in the event of loss under an insurance contract, failure to pay within thirty days after demand should render the insurance company liable to pay the policyholder additional damages of 12% of the loss and attorneys' fees. The Texas court rendered judgment for the plaintiff in accordance with this provision of the Texas statute.

In this court on writ of error, it was urged that the contract was a Tennessee or Connecticut contract and since there was no provision in such states for the additional damages or attorneys' fee, the Texas statute as construed and applied violated the contract impair-

ment clause, the full faith and credit clause and several clauses of Article I of the Fourteenth Amendment of the Constitution.

This court held that (1) the substituted policy was a contract made in Tennessee because it was issued in discharge of a pre-existing obligation under the original Tennessee contract, and (2) the state court's application of the Texas statute to a contract made in Tennessee was in violation of the contract impairment, full faith and credit and due process provisions of the Constitution, because the Texas statute as construed and applied by the Texas court attempted to bring within the jurisdiction of Texas persons or subject-matter properly without the state and thus to deprive them of property without due process of law.

It will be seen that in the above case, as in the instant proceeding, the insured was a resident of the State of Texas at the time of the accrual of the obligation for which a suit was brought in the Texas courts. The statutory provision in that case providing that all contracts entered into with citizens of the State of Texas should be regarded as Texas contracts or declaratory of the public policy of the state as was the provision for additional damages for delinquent payments. These statutory provisions were in existence in Texas at the time that the original contract of insurance was entered into. In spite of the remedial aspect of the statute this court held the law of the forum could not constitutionally be applied to control the terms of a valid foreign contract.

Cf. *Allgeyer* v. *Louisiana*, 1897, 165 U. S. 578.

FOURTH POINT

THE JUDGMENT OF THE TEXAS COURTS AGAINST THE AMERICAN INSURANCE COMPANIES AS GARNISHEES WAS RENDERED WITHOUT JURISDICTION AND, THEREFORE, DEPRIVED THESE APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

A. *At the time of the garnishment there was no debt owing by the American Reinsurance Companies to the Mexican Insurance Company.*

The Texas Supreme Court held that there was a debt due from the American Reinsurance Companies to the Mexican Insurance Company at the time of the garnishment for the reason that "a debt arises between the original insurer and the reinsurer immediately upon the happening of a loss under an insurance policy," citing *Allemannia Ins. Co.* v. *Firemen's Ins. Co.*, 1908, 209 U. S. 326 (R. 82).

That decision, however, does not go so far. The issue in that case was not whether the liability of the reinsurer arises upon happening of the loss, irrespective of whether liability is disputed, but only whether the liability of the reinsurer is conditioned upon the actual payment of the loss. In that case the liability of the direct writing company was admitted and the question before the court was whether, in the case of an admitted liability by the direct writing company to pay the loss to the assured, it was necessary that the admission

should be followed by actual payment before enforcing the reinsurer's undertaking to contribute. The decision was that the reinsurer's undertaking was to indemnify against liability as distinguished from indemnification against loss or payment, an obviously different thing from a holding that the happening of a loss alone creates a debt from the reinsurer to the direct writing insurance company.

In the *Allemannia* case this court considered the general nature of transactions known as reinsurance. Had it been necessary to do so in that case, the court undoubtedly would have considered the question of the obligation of the reinsurer in a situation such as is presented in the case at bar where the liability of the direct writing company to the insured is not admitted, but, on the contrary, is contested. In this case the existence of a dispute as to the liability of the direct writing company is obvious from the fact that the assured had demanded payment of the loss in question and that the Mexican Insurance Company had refused for over six years to make payment (R. 9). The demand of the assured was not made the subject of a suit by the assured in Mexico and the reason therefor may be suggested by the fact that in the case before the Texas court, two defenses on the merits were set up on behalf of the Mexican Insurance Company, and, in addition, the defense that the assured had let his rights lapse by failing to bring proceedings within the year provided by the terms of the insurance contract.

If the court will now consider the nature of the transaction known as reinsurance in its relation to the facts in this case where liability of the direct writing company has been consistently disputed and is still disputed, as distinguished from the facts in the *Allemannia* case where the direct writing company stood before the court admitting its liability, the court will, no doubt, conclude that the language quoted above from the *Allemannia* case, while expressing accurately the legal principle necessary to that decision, cannot be accepted as applicable to cases of disputed loss without material qualification or explanation.

The undertaking of a reinsurance company is frequently expressed, in the parlance of the insurance business, as to "follow the fortunes" of the direct writing company in reference to the policy of insurance. By the customs of the business which are inherent in the nature of reinsurance, the direct writing company is authorized to determine all questions in connection with claims for losses. It may admit liability or deny it; it may defend litigations or it may settle them. All such decisions, in the absence of fraud, are binding upon the reinsurer.

The reinsurer is also accorded a *pro rata* affirmative right to the benefits which the direct writing company may secure for itself, such as salvages or recoveries. Consequently, it can be said only in a relative rather than in an absolute way, that the debt arises between the original insurer and the reinsurer immediately upon the happening of a loss. It is true that the obligation

of a reinsurer, as also of the direct insurer, if and when established, relates back to the loss. But it is not true to say that the loss establishes the liability of the reinsurer in cases where the direct insurer has not caused its own liability to be established, either by admission binding upon the reinsurer, or by judgment.

The statutes of Texas as to garnishments, *R. C. S., Texas, 1925, Title 68,* do not differ from the usual statutes as to that subject. They refer throughout to "debt" and "indebtedness." *R. C. S., Texas, 1925, Arts. 4078, 4079, 4081, 4084, 4088.* The Texas courts hold that claims which are not liquidated so that the garnishee may compute and return the amount of the demand cannot be garnished. *Waples-Platter Grocer Co.* v. *Texas & Pacific Ry. Co.*, 1902, 95 Tex. 486; *Armengol* v. *Richter*, 1911, 141 S. W. 1028.

In this situation, it is claimed that a debt did not arise between the insurer and the reinsurer upon the happening of a loss; that if the direct insurer had sued the reinsurers upon the contract of reinsurance the defense would have been available that no liability had arisen as between the parties to the contract. It follows that as it was necessary for the Texas court to find at the time of the garnishment an existing debt liquidated in amount in order to support its garnishee process, that court erred in its determination that there was such a debt in existence.

Thus without a judgment against the Mexican Insurance Company, or any admission of liability by it, the American Reinsurance Companies owed it nothing

and, therefore, could not have anything to be garnished; but without a seizure by garnishment against the American Reinsurance Companies there would have been no way of obtaining a judgment against the Mexican Insurance Company.

Thus in rendering judgment against both the Mexican Insurance Company and the American Reinsurance Companies the court below reached this result by assuming the indebtedness in order to justify jurisdiction and judgment against the Mexican Insurance Company, and then having thus established such judgment by assumption, proceeded to conclude that therefore the American Reinsurance Companies were indebted to the direct writing company. The opinion of the Texas Supreme Court states that valid garnishments impounded funds in the hands of the two garnishees (R. 82). This may be true enough but the funds impounded were those belonging to the garnishees. In the nature of things the funds could not have been funds belonging to the Mexican Company.

In view of the fact that the transaction was entered into, was to be performed, and related to property, outside of Texas, and further considering that the reinsurance contracts were entered into and were to be performed outside of Texas and had no connection whatever with anything done or to be done by the Mexican Company or the American Reinsurance Companies in Texas, the case presents an extremely unjust application of the garnishment principle.

B. *Assuming that, at the time of the garnishment, an indebtedness from American Reinsurance Companies to the Mexican Insurance Company was in existence, it was not a res within the jurisdiction of the Texas courts.*

Service of process was had upon the local Texas agents of the two American Reinsurance Companies (New York corporations) not for the purpose of subjecting those companies to the general jurisdiction of the court in order that any legal liability running against them in favor of the plaintiff might be asserted. There was no such liability for the reason that there was no contract between the plaintiff and the Reinsurance Companies. The right of the plaintiff asserted in the action was, of course, a right against the Mexican Insurance Company only. The making of reinsurance contracts between the Mexican Insurance Company and the American Reinsurance Companies created no privity between the plaintiff and the American Reinsurance Companies. *Morris & Co.* v. *Ins. Co.*, 1929, 279 U. S. 405.

The purpose of serving the local agents of the American Reinsurance Companies was to accomplish, by indirection, that which might have been directly accomplished had there been a privity of contract between the plaintiff and the American Reinsurance Companies. Thus the agents were served for the purpose of drawing the corporate debtor into the Texas jurisdiction in order that the debt might be there and thus subject to process *in rem*. The question thereupon arises whether that

purpose was accomplished. This question is to be answered by a consideration of the principles of the law as to conflict of jurisdiction and as to *situs* of intangible choses in action.

An unusually satisfying discussion of these principles is contained in the opinion of Chief Judge Andrews of the Court of Appeals of the State of New York in the case of *Douglass* v. *P. Ins. Co.*, 1893, 138 N. Y. 209, which was referred to with approval but distinguished by this court in *Harris* v. *Balk*, 1905, 198 U. S. 215 at 225.

The pertinent facts of the *Douglass* case were as follows: Plaintiff, a resident of New York, sued the defendant, a New York insurance corporation, for the recovery of a loss under a policy of fire insurance on property situated in New York. The defendant insurance company pleaded in abatement in substance that it was carrying on business and maintained an agency in the State of Massachusetts; that pursuant to the laws of that state it had appointed an attorney therein upon whom process could be served; that prior to the commencement of the New York action an action was begun in Massachusetts by creditors of the plaintiff residing in that state against the plaintiff and the defendant, and that therein the debt owing by the defendant had been attached by service of trustee process upon the agent of the insurance company in Massachusetts, but without personal service of the plaintiff in the New York case, who was a co-defendant in the Massachusetts case. A demurrer to this plea was sustained in the lower courts

of New York and the judgment affirmed by the unanimous decision of the Court of Appeals.

In the course of the opinion Judge Andrews said:

> "But attachment suits partake of the nature of suits *in rem*, and are distinctly such when they proceed without jurisdiction having been acquired of the person of the debtor in the attachment. Real and personal property may be subjected to seizure and sale for the payment of debts of the owner, according to the laws of the state or sovereignty where the property is, having regard to the fundamental condition that due process of law shall precede the appropriation. It is undeniable that a state may authorize the seizure and sale by means of appropriate judicial proceedings of property of non-residents within the jurisdiction for the payment of their debts. There must be notice and an opportunity to be heard, either actual or constructive, in such way and form as the law may prescribe. But no state can subject either real or personal property out of the jurisdiction to its laws. It may, and often does, compel persons, through the process and judgment of its courts, to perform acts which affect their title and interest in and to property outside of the limits of the state. Having acquired jurisdiction of the person, the courts can compel observance of its decrees by proceedings *in personam* against the owner within the jurisdiction. But it is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction. (*Plimp-*

ton v. *Bigelow,* 93 N. Y. 593.) In the case of moveables their seizure under the attachment shows that their actual situs is within the jurisdiction. But in respect to intangible interests, debts, choses in action, bonds, notes, accounts, interests in corporate stocks and things of a similar nature, the question whether the *res* is within the jurisdiction of the sovereignty where the process is issued, is not so readily determined. The general rule is well settled that the situs of debts and obligations is at the domicile of the creditor. But the attachment laws of our own and of other states recognize the right of a creditor of a non-resident to attach a debt or credit owing or due to him by a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned that the laws of a state, for the purposes of attachment proceedings, may fix the situs of a debt at the domicile of the debtor. (*Embree* v. *Hanna, supra; Williams* v. *Ingersoll,* 89 N. Y. 508, 529.) It is at least doubtful whether this qualification of the general rule applies to negotiable instruments or other written obligations of a resident debtor, held by and in the possession of his non-resident creditor. (See *Osgood* v. *Maguire,* 61 N. Y. 524.) But we repeat, no court can acquire jurisdiction in attachment proceedings unless the *res* is either actually or constructively within the jurisdiction, and we are of opinion that the attempt to execute an attachment in Massachusetts upon the debts owing to the plaintiff by the insurance company, by serving upon the agent of the corporation there, and without having acquired jurisdiction of the

plaintiff, must fail for the reason that the debtor, the insurance company, was in no just or legal sense a resident of Massachusetts and had no domicile there, and was not the agent of the plaintiff, and that in contemplation of law the company and the debt were at the time of the issuing of the attachment in the state of New York, and not in the state of Massachusetts. This court has had occasion heretofore to consider the effect of the act of a foreign corporation constituting an agent in another state, upon whom proceedings may be served, done in compliance with the laws of such state in pursuance of a condition imposed, and to enable the corporation to do business in such state. It has been held that by such act the corporation does not change its domicile of origin or its residence. It becomes bound by judgments rendered upon service on the designated agent, because it has consented so to be bound, but it remains as before a resident of the state where it is incorporated. (*Gibbs* v. *Queen Ins. Co.*, 63 N. Y. 114; *Plimpton* v. *Bigelow, supra.*) If in this case the insurance company could be regarded as residing or having its domicile in Massachusetts for the purpose of attachment proceedings, it likewise has a domicile in every state where it may have appointed an agent under similar laws, and so constructively, upon the theory upon which the Massachusetts attachment is defended, the corporation is present as debtor to the plaintiff in every state where such agency exists, and the creditor is also present at the same time in each of such jurisdictions. The admission of such a

principle would give rise to most embarrassing conflicts of jurisdiction and subject creditors of domestic corporations to great prejudice. We think the rule is that a domestic corporation at all times has its exclusive residence and domicile in the jurisdiction of origin, and that it cannot be garnisheed in another jurisdiction for debts owing by it to home creditors, so as to make the attachment effectual against its creditor in the absence of jurisdiction acquired over the person of such creditor.

* * * * * *

"But the question in this state cannot be controlled by the statutes of Massachusetts. The legal proceedings or judgments of another state are recognized here only where jurisdiction has been acquired in the foreign forum. But it is only jurisdiction in an international sense, or according to the course of common law, and judicial proceedings which conform to, or rather, which are not taken in disregard of the principles and rules of general jurisprudence, which this state is bound to recognize, and if the laws of Massachusetts go to the extent claimed, and assume to authorize attachment proceedings to seize a credit owing to a resident of this state, when neither the debtor nor creditor are within the jurisdiction, this state is not, we think, bound to recognize them. The law of a state cannot make a debtor a resident of that state by so declaring, contrary to the fact and the rule of general law, at least so as to bind another jurisdiction by the declaration." Pp. 218-221.

It will be recalled that in the case of *Harris* v. *Balk*, 1905, 198 U. S. 215, Harris, a citizen of North Carolina, owed money to Balk, also a citizen of that state. Harris, while temporarily in Maryland, was garnisheed by a creditor of Balk. Process was personally served in Maryland upon Harris and judgment was thereafter entered and paid. Thereafter Harris was sued by Balk in North Carolina for the same debt. This court (reversing the court of North Carolina) held that the payment in the Maryland garnishee proceeding was a defense in the subsequent North Carolina action. The decision was to the general effect that a judgment against a garnishee properly obtained, according to the law of the state where instituted and paid must, under the full faith and credit clause of the Constitution, be recognized by the courts of another state as a payment of the original debt. The judgment of garnishment was properly obtained because the obligation of the debtor to pay his debt was a personal one existing in any jurisdiction in which the debtor might be, whether temporarily or otherwise, and the test of jurisdiction to garnish in Maryland was whether the creditor of the garnishee could have sued for the debt in Maryland. Upon these two propositions of law, the payment in the garnishee proceeding in Maryland was held to bar recovery in the subsequent suit in North Carolina.

This court commented on the *Douglass* case as follows:

> "The case in 138 N. Y. 209, *Douglass* v. *Insurance Co.*, is not contrary to this doctrine.

> The question there was not as to the temporary character of the presence of the garnishee in the State of Massachusetts, but, as the garnishee was a foreign corporation, it was held that it was not within the State of Massachusetts so as to be liable to attachment by the service upon an agent of the company within that State. The general principle laid down in *Embree* v. *Hanna*, 5 Johns. (N. Y.) 101, was recognized as correct." *Harris* v. *Balk*, 1905, 198 U. S. 215, 225.

It may be observed that in *Harris* v. *Balk* this court did not cite the *Douglass* case and then express any disagreement. The case was cited with apparent approval but distinguished from the case at the bar of this court, as it well might be. There is a fundamental and a very practical difference between the laying hold by garnishment process, of an indebtedness due from an individual where the process is served personally as in the *Harris* case, and the laying hold of a debt due from a corporation by process not served upon an officer of the corporation but served merely upon a local agent in any one of the jurisdictions in which the corporation may have an agent, where the debt does not arise from any transaction within the jurisdiction nor relate to the business which the local agent is conducting. The importance of this question to insurance companies doing business throughout the country, with local agents of local authority in numerous communities in the several states, can scarcely be over-estimated.

Assuming the question to be an open one, or the court to be prepared to consider favorably the reasoning of Chief Judge Andrews in the *Douglass* case, it is respectfully urged that the principles and the conclusion of that court should be adopted as a proper adjustment of jurisdictional conflicts in cases where the obligations of insurance companies are involved. It may perhaps with propriety, be added that the difficulties of insurance companies, arising from the uncertainties of the various laws in reference to garnishee process, have, in the past, been extensive and highly burdensome. There seems to be no sound reason why their contracts and the obligations thereof should not be localized in accordance with the practical and common sense intendment of the parties and it is, therefore, respectfully urged that this court should, in so far as possible, give consideration to a rule for adjustment of such jurisdictional conflicts in the interest of orderly procedure and having regard to the business necessities of companies engaged in an important service to the people of the country generally, which service necessarily involves the use of agents of limited authority in every community in the country and the making of a multitude of contracts, which by their very nature are intended to have only a local operation.

The economic desirability of this seems to have been appreciated by this court. *Morris & Co.* v. *Ins. Co.*, 1929, 279 U. S. 405.

The case at bar is strongly suggestive of the general injustice to which insurance companies are subjected.

It was at least a natural expectation on the part of New York insurance companies that upon entering into a reinsurance contract with a Mexican Insurance Company, their obligations thereunder would be worked out between the parties to the contract and in Mexico or in New York as the contract should provide. It was not within the scope of any reasonable expectation that the making of such a reinsurance agreement with the Mexican Insurance Company would have the effect of drawing the question of their liabilities into litigation in Texas, where the other party to the contract, the Mexican Insurance Company, is not in court at all and where they (the New York companies) are compelled to litigate questions of their liability at a place far removed from the domicile of the officers in charge of such matters and where their activities are normally restricted to the conduct of local transactions by a local agent.

It may be that the case of *Louisville & Nashville Railroad* v. *Deer*, 1906, 200 U. S. 176, will be pointed to as authority against the arguments which are here advanced. That case was an action to recover an admitted debt. The plaintiff—the railroad company—had been garnisheed in a suit brought against it in Florida where the railroad company did business. The original creditor had been notified of the proceeding by publication but had not defended. The judgment had been paid. That payment was held by this court to be a valid defense to the subsequent action, citing *Harris* v. *Balk*. Counsel for the appellants will not venture a suggestion as to whether it was intended by that decision to estab-

lish the law for all corporations, including railroads and insurance companies, to the effect that the appointment of every agent, in any jurisdiction, carries into that jurisdiction, so as to be subject to garnishee process, any indebtedness however or wherever contracted. It may be observed that that case, and also the case of *Harris* v. *Balk*, arose after judgment had been satisfied by payment in the prior proceeding. Had either of those cases been decided otherwise than as they were, double payment of the same liability would have resulted and it may be that the court was influenced in those cases by such broad and general considerations as were expressed by Chief Justice Kent in *Embree* v. *Hanna*, 1809, 5 Johns. (N. Y.) 101.

In the case at bar this court is not faced with the pressing consideration that if the garnishment proceeding in Texas is not upheld, the inequity of a double recovery would result.

CONCLUSION

THE JUDGMENT OF THE SUPREME COURT OF TEXAS SHOULD BE REVERSED AND THE CAUSE REMANDED WITH DIRECTION TO DISMISS BOTH COMPLAINTS.

New York, January 3, 1930.

Respectfully submitted,

DAVID RUMSEY
MARK W. MACLAY
Counsel for Appellants

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SEP 17
CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY,
Appellants,

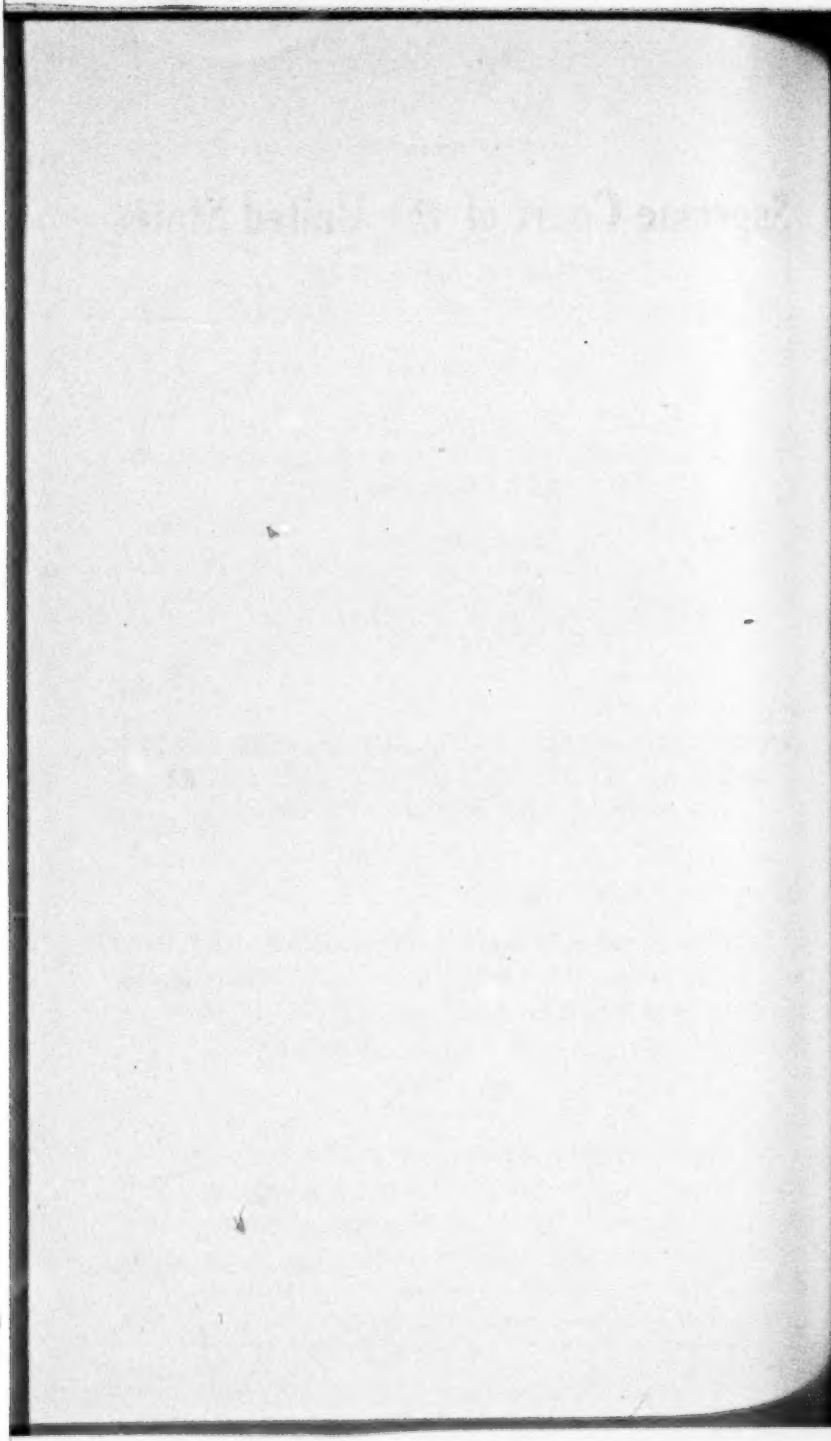
vs.

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY and SUDERMAN & YOUNG, INC.,
Appellees.

ANSWER OF APPELLEES TO APPELLANTS' STATEMENT AS TO JURISDICTION OF THIS COURT ON APPEAL AND MOTION TO DISMISS.

H. C. HUGHES,
JOHN NEETHE,
Counsel for Appellees.

KNAPP BROS., STATIONERS & PRINT., GALV



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Appellees.

ANSWER OF APPELLEES TO APPELLANTS' STATEMENT AS TO JURISDICTION OF THIS COURT ON APPEAL AND MOTION TO DISMISS.

MAY IT PLEASE THE COURT:

Appellees hereby present their answer to the statement as to jurisdiction of this court heretofore made by appellants and in conjunction therewith present their motion to dismiss this appeal for want of jurisdiction.

A.

We accept as substantially correct the facts cited by appellants to support jurisdiction; but add only, that it is shown by the record that C. J. Dick was at all times during this controversy a resident and citizen of the State of Texas and temporarily absent in Mexico at the time the liability herein urged arose. The record also shows that

the American reinsurance corporations had permits to do business in the State of Texas and had local agents in that State.

Replying to appellants' statement, appellees respectfully suggest that this court has no power to consider this case for the following reasons:

B.

Two Federal questions only were attempted to be raised in the courts below. These were:

(1) That Article 5545 of the Revised Statutes of the State of Texas (1925), set out in appellants statement, as applied to the contract of insurance sued on is unconstitutional and in violation of Article 1, section 10, clause one of the Federal Constitution.

(2) Did application of said statute deprive appellants of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution?

These questions were raised by five different assignments of error, all being to the same purport, however. (Rec. 248). No other federal question was suggested or assigned in the lower courts, and, therefore, no other will be considered by this court: Chapin vs. Fye, 179 U. S. 126, 45 L. Ed. 119.

The present statute allowing appeals gives such rights only in the Supreme Court as "heretofore could have been obtained by writs of error." It has always been necessary that a substantial federal question be involved in a case from the state court to give this court jurisdiction and such question must have been urged and passed upon by the courts below and assigned as error:

Sawyer vs. Piper, 189 U. S. 154; 47 L. Ed. 157;

Equitable Life Assurance Society vs. Brown 187 U. S. 311; 47 L. Ed. 190.

The court will, therefore, have to pass upon whether any federal questions are involved or, if any, whether insofar as urged, they are without substance and wholly frivolous.

C.

ON IMPAIRING OBLIGATION OF CONTRACT:

(1) This section of the Constitution refers only to legislation enacted subsequent to the making of the contract in litigation.

Cross Lake Shooting & F. Club vs. Louisiana, 224 U. S. 633; 56 L. Ed. 924.

Munday vs. Wisconsin T. Co., 252 U. S. 501; 64 L. Ed. 684;

Detroit United Railway vs. Detroit, 242 U. S. 238; 61 L. Ed. 268.

(2) Section 5545 of the Revised Statutes of Texas was enacted in 1891. The contracts here in question were made long after, and are, therefore, not affected by the constitutional provision denying the states the right to pass laws impairing the obligation of contracts. The statute is an integral part of the public policy of the state in reference to how litigation within its courts shall be conducted, and the policy of the state so enacted is not a federal question, and certainly not in reference to remedies given by a state to litigants:

Bond vs. Hume, 243 U. S. 21, 61 L. Ed. 569;

Tarver vs. Keach, 15 Wall. 67, 21 L. Ed. 82;

Railway Company vs. Wiggins Ferry Co., 119 U. S. 615; 30 L. Ed. 523;

Railway Co. vs. Plainview, 143 U. S. 371; 36 L. Ed. 200;

Delmas vs. Insurance Co., 14 Wall 661, 20 L. Ed. 757;

Union Trust Co. vs. Grosman, 245 U. S. 415, 62 L. Ed. 368;

The Kensington, 183 U. S. 263;

Bothwell vs. Buckbee Mears & Co., 275 U. S. 273, 72 L. Ed. 277.

(3) The obligation of a contract is not impaired by a change in the remedy as long as an adequate remedy or defense is saved to the litigant.

Campbell vs. Holt, 115 U. S. 620; 29 L. Ed. 483;

Bank vs. Franklyn, 120 U. S. 747; 30 L. Ed. 828;

Tennessee vs. Sneed, 96 U. S. 69; 24 L. Ed. 610;

Pittsburgh Steel Company vs. Baltimore Equitable Society, 226 U. S. 457; 57 L. Ed. 299;

Antoni vs. Greenhow, 107 U. S. 669; 27 L. Ed. 468;

McCullough vs. Virginia, 172 U. S. 123; 43 L. Ed. 390;

Bank of the United States vs. Donnally, 8 Peters 361; 8 L. Ed. 974;

McElmoyle vs. Cohen, 13 Peters 327.

D.

ON DUE PROCESS OF LAW:

This case was filed, due service by publication made on the Mexican Company, the appellants, garnishees, were duly served by lawful process on local agents who transacted their business within the state and appeared generally. They defended the cause of action against them and judgment was rendered in favor of appellees against appellants as garnishees, they being found indebted to the Mexican Company. This is clearly due process of law.

New Orleans Water Works Co. vs. Louisiana, 185 U. S. 346; 46 L. Ed. 943;

Con. Rendering Co. vs. Vermont, 207 U. S. 550; 52 L. Ed. 335.

Due process does not control practice in state courts.

Railway Co. vs. Schmidt, 177 U. S. 230; 44 L. Ed. 750;
Railway Co. vs. Iowa, 160 U. S. 467; 40 L. Ed. 469.

E.

In rendering judgment in this case, the state courts simply followed the public policy of the state as set forth in its statutes and the decision of its highest court construing such statute. This in truth was the basis of the decision herein and the determination of the so called federal questions were not necessary to a decision herein. The judgment of the state court is fully supported upon grounds other than federal, and therefore no federal question is involved.

Bacon vs. Texas, 163 U. S. 207; 41 L. Ed. 132;

Building Association vs. Brahan, 193 U. S. 635; 48 L. Ed. 823;

Enterprise Irrigation District vs. Farmers Mutual Canal Co., 243 U. S. 162; 61 L. Ed. 648;

Leathe vs. Thomas, 207 U. S. 99; 52 L. Ed. 120;

Arkansas So. Ry. Co. vs. German Nat'l Bank, 207 U. S. 273; 52 L. Ed. 201.

In conclusion we would say that we have examined the decisions cited by appellants upon which they rely to sustain jurisdiction in this court and respectfully suggest that the facts in them are so dissimilar to the facts in the case at bar that their citations seem to have no relevancy whatever.

Kansas City So. Ry. vs. Road Imp. Dist. No. 6, 256 U. S. 659-660, is a tax case in which the railroad corporation was taxed so inordinately as to deprive it of equal protection of the law. Dahnke-Walker Co. vs. Bondurant, 257 U. S. 282, 287, 290, determines that the transaction in question is interstate commerce and that therefore a state statute attempting to burden such interstate commerce is invalid.

Aetna Life Insurance Co. vs. Dunken, 266 U. S. 390-405, is in reference to a policy of life insurance. On this, avowedly a Tennessee contract, the state courts endeavored to impress a subsequently passed penal statute of Texas providing for 12% damages and attorney's fees, and it was most logically held that by such subsequent legislation an additional burden on the life insurance company ought not to be enforced in connection with a policy duly issued under the statutes then in force in Tennessee. The full faith and credit clause of the constitution was involved.

Fiske vs. Kansas, 274 U. S. 380, 385, rules naught more than that a statute of Kansas prohibiting syndicalism is unconstitutional for lack of due process as against the appellant in that case for total want of criminality in the matters charged against him.

Millsaps College vs. City of Jackson, 275 U. S. 129, 132, is a tax case and simply affirms the doctrine that this court will follow the construction of the highest state court in reference to matters of taxation.

Saltonstall vs. Saltonstall and others, 276 U. S. 260, is also a tax question under a state inheritance tax law and reiterates the doctrine of the foreging case—that this court will follow the state court as far as may be in the construction of such statute.

We respectfully submit that a contract made in a foreign country is not entitled to the protection of the Constitution of the United States any more than is the legislation of such foreign country or a judgment obtained therein. When a litigant claims rights under a foreign contract and when brought into courts of the United States or any of the states he is entitled to due process of course; but as to the remedies on such contract they are controlled by the public policy of the forum where the suit is brought.

Aetna Life Insurance Co. vs. Tremblay, 223 U. S. 185, 56 L. Ed. 398.

League vs. Young, 11 How. 185; 13 L. Ed. 657; 6 R. C. L. 323.

Appellees respectfully urge that this cause should be dismissed.

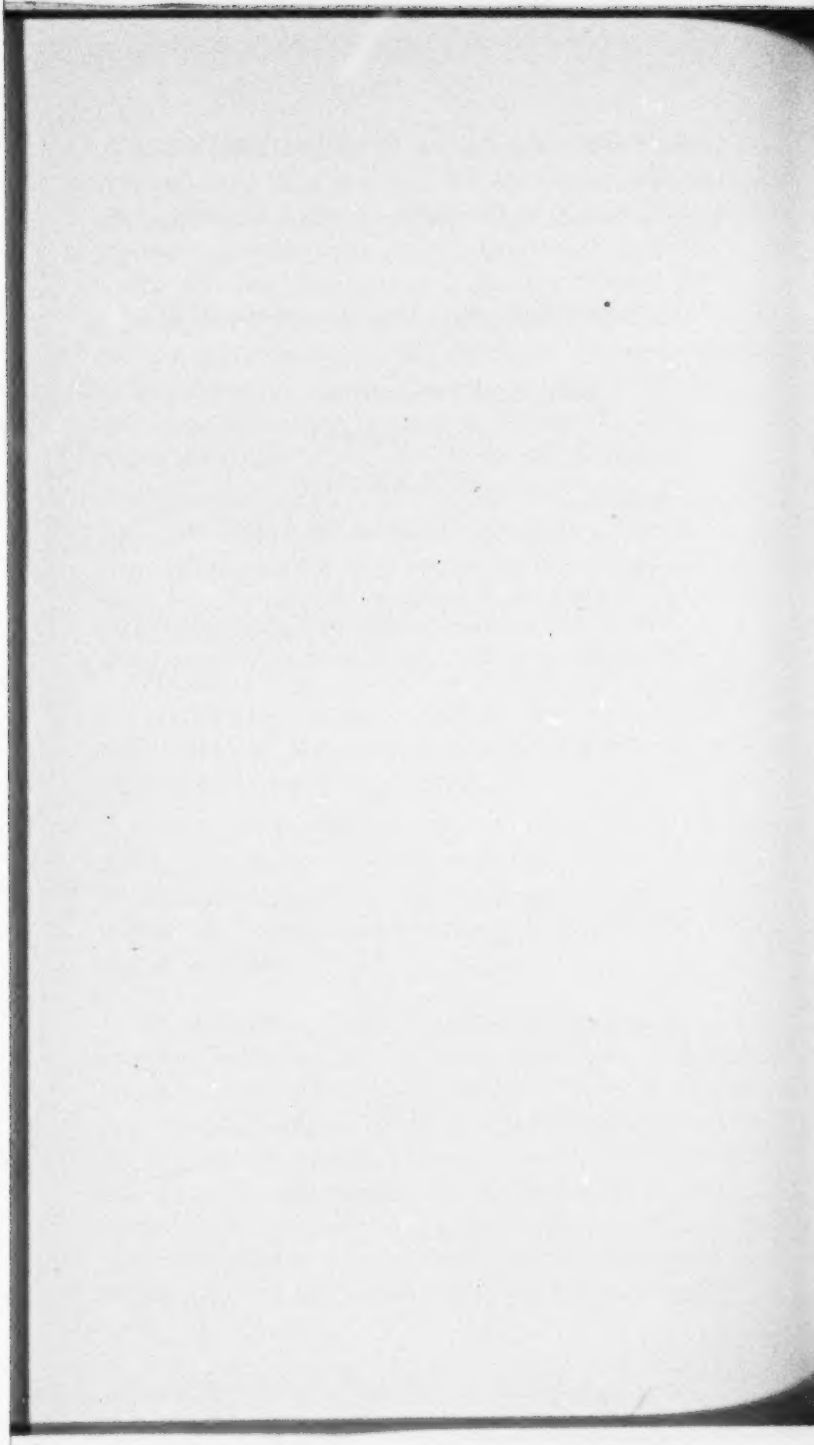
Respectfully submitted,

H. C. HUGHES,

JOHN NEETHE,

Counsel for Appellees.

Note: The record to which references may have been made in the foregoing is the same record as the one used by appellants.



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SEP 28

CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY,

Petitioners,

vs.

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY and SUDERMAN & YOUNG, INC.,

Respondents.

Answer to Petition for Writ of Certiorari.

H. C. HUGHES,
JOHN NEETHE,
JOHN L. DARROUZET,
Counsel for Respondents.

KNAPP BROS., STATIONERS & PRINT., GALV

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C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY and SUDERMAN & YOUNG, INC.,

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Answer to Petition for Writ of Certiorari.

MAY IT PLEASE THE COURT:

We respectfully submit to the Court that long before it should consider this petition it ought to dispose of the "Statement of the Points showing Jurisdiction" of this case in this Court made by the appellants and the answer filed by us. And in connection with these we know it will consider our motion to dismiss on the ground that no federal question is involved, that the bringing in of this federal question is wholly incidental and that the judgment of the State court rests on the grounds wholly non-federal.

In answer to the petition for writ of certiorari respondents say that in presenting the petition herein the petitioners seem to have lost sight of the fact that this is

a case from a State Court wherein the public policy of Texas is determined. The petitioners now seek to bring into this case purely non-federal questions not heretofore assigned in the lower courts. (Rec. 248).

> "It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decision, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary. * * *
>
> The State Court * * * may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong,"

yet this court holds it has no jurisdiction unless a federal question is involved. Central Land Co. v. Laidley, 159 U. S. 103-112, 40 L. Ed. 91. We will not repeat what has been said in the "Answer of Appellee to Appellant's Statement as to Jurisdiction and Motion to Dismiss," as we think that all of the matters set up therein are more fully applicable to this Petition for Certiorari.

Ever since the early case of Hawkins vs. Barney, 5 Pet. 457, it has been held that "laws limiting the time of bringing suit constitute a part of the lex fori of every country. There are laws of administering justice—one of the most sacred and important of sovereign rights and duties."

Article 5545 of the Revised Civil Statutes of Texas quoted is the statement of the public policy of Texas on the subject of agreed limitations and is binding on the Texas courts as to all causes of action that come within the jurisdiction of Texas tribunals. The holding of the Texas Court in this case is not a new or fanciful departure from the regular course of a settled line of decisions. The

rule here applied prevails in Alabama, Galliher vs. State Mutual Life Insurance Company, 150 Ala. 543, 124 Am. St. Reports 83; in Virginia, Smith vs. Northen Neck Mt. Fire Association, 112 Va. 192, 70 S. E. 482, 38 L. R. A. N. S. 1019; in Kansas, Hornick vs. First Catholic Slovac Union, 115 Kan. 597, 224 Pac. 486. In the latter case 7 Cooley's brief on the law of Insurance, 1673, and 5 Joyce on Insurance, par. 3224, are both cited as sustaining the rule followed in this case. And in New York in South and Central American Commercial Company vs. Panama R. Co., 237 N. Y. 287, 142 N .E. 666, the New York Court of Appeals holds that short stipulations in foreign bills of lading are void in that State though valid where made. The rule is also sustained in 14 Ruling Case Law, 1418, par. 580, and in 13 C. J. 260. Not only have many States passed such legislation evidencing their public policy but Congress has seen fit to enact a similar statute with respect to clauses in bills of lading in respect to the time for filing suits against transportation and railway companies engaged in interstate commerce. 49 U. S. C. A. page 75, Sec. 20, par. 11.

The law in Texas was the same as in the Riddlesbarger case until after the enactment of Article 5545 which changed the public policy of the State on such subject. The state cases cited by petitioners simply show the public policy of each particular state. They are not relevant when it comes to fix the public policy of Texas. That is a matter solely for the Texas courts, particularly when they construe a Texas statute. As above stated there is a great distinction between the facts of those cases and ours. In Kentucky there is no statute similar to the one in Texas. In North Dakota the agreed limitation had the effect of extinguishing the debt while the parties and cause of action were subject to the jurisdiction of the State where the policy was issued.

The rule as to the rights between the original insurer and the reinsurer was not first laid down in the Supreme Court of the United States in the Allemannia case cited in the petition herein. This decision but followed a long line of State decisions. This case, Allemannia Fire Insurance Company vs. Firemen's Insurance Company, 209 U. S. 326, 52 L. Ed. 815, has been followed recently by this Court in Hicks vs. Poe, 269 U. S. 118, 121, 70 L. Ed. 187, where this Court specifically says that such questions are not federal in their nature.

It would be hard for us to believe that this court would overrule what has been said and approved so forcibly in Chicago R. I. & P. Ry. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1144, and in King vs. Cross, 175 U. S. 399, 44 L. Ed. 213, with respect to the situs of a debt and as to the right of the creditors residing in one State, to issue garnishments on indebtedness belonging to non-residents, and to foreclose upon same through the regular course of procedure in the State courts. Such procedure was held to be "due process of law," in spite of the fact that in the Sturm case no recovery could have been had in the domicile of the non-resident defendant because the money was exempt.

The petitioner refers to the case of Morris vs. Scandinavia Insurance Co., wherein it is stated that there is no privity between the insured and the reinsurer. This lack of privity was the very reason that suit was not brought directly against the reinsurers but was brought against the Mexican Company and the reinsurance companies brought in by garnishment. The fund found due from the reinsurers to the original insurer was foreclosed on. This is a remedy allowed by the state law of Texas and on this no federal question is involved. We know of no reason, and petitioners have pointed out none, why reinsurance companies should have any special privilege and not be subject to garnishment proceeding with respect

to debts due by them to others. Certainly there is no inhibition in the constitution on this subject.

There has never been any real effort to show that the petitioners owed nothing on their reinsurance contracts, but only a determined effort to escape by highly technical defenses which were all overruled by the State courts after full hearing.

WHEREFORE, respondents pray that said petition be dismissed for want of jurisdiction or in the alternative that the same be denied.

H. C. HUGHES,
JOHN NEETHE,
JOHN L. DARROUZET,

Counsel for Respondents.

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY
Appellants,

vs.

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY and SUDERMAN & YOUNG, INC.,
Appellees.

BRIEF FOR APPELLEES

H. C. HUGHES,
JOHN NEETHE,
JOHN L. DARROUZET,
Counsel for Appellees.

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As the Federal Constitution has no extra-territorial effect, it will not protect foreign contracts, and particularly is this true when they are in direct conflict with the law of the State of the forum where they are sought to be enforced.

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The contractual provision was purely a clause of limitation and applied to the remedy only. In any event the State courts had a right to so construe the contract.

POINT FOUR 19

Even if it should be held that the provision in reference to limitation was a substantive part of the contract, yet such provision is in direct contravention to the policy of the State of Texas, as declared by its laws and the decisions thereunder, and the courts of

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Texas will not be compelled to enforce any law that is against the public policy of the State.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY

Appellants,

vs.

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY and SUDERMAN & YOUNG, INC.,

Appellees.

BRIEF FOR APPELLEES

TO THE SUPREME COURT OF THE UNITED STATES:

The appellees desire to enlarge herein to some extent on what has been said in their "Answer to Appellant's Statement as to Jurisdiction" and in the "Answer to the petition for Writ of Certiorari" and will further undertake to point out why this cause should be affirmed, even if this court should decide that it has jurisdiction to pass on the questions involved.

To the statement of the case made by appellants, and commencing on page 3 of their brief the facts should be added: that C. J. Dick at all times was a resident and citizen of the State of Texas and of the United States. He returned from Mexico to Texas about two weeks after the loss covered by the policies of insurance occurred (Rec. 10). The re-insurance companies accepted reinsurance of

$15,000.00 each, absolutely and without condition (Rec. 40). The question of fact that the vessel was totally destroyed was found by the trial court and affirmed by the Court of Civil Appeals and is, therefore, conclusive in all other appellate proceedings. There is nothing in the policy which fixes the place of payment except the fact that it was made and delivered in Mexico. The ownership and situs of the entire claim against the Mexican Insurance Company has been at all times located in Galveston, Texas, at least since the time that C. J. Dick returned from his temporary visit in Mexico (Rec. 10). The interveners also resided in Texas and the policy of Insurance was payable to the Texas & Gulf Steamship Company of Galveston, Texas, as its interest might appear (Rec. 38-39).

POINT ONE.

This Court has no jurisdiction to revise the questions passed on by the Supreme Court of Texas.

The appellants did not raise the federal questions suggested in the trial court at all. They did not assign such questions as error on their appeal from the District Court of Galveston County to the Court of Civil Appeals. (Rec. 28-31). The federal question was brought into the Court of Civil Appeals by the brief and not by the assignments of error. This indicates how fully and fairly all questions were considered by the Appellate Courts of Texas, even though not assigned. Two federal questions only were attempted to be raised in the court below. These were:

(1) That Article 5545 of the Revised Statutes of the State of Texas, (1925), set out in appellant's statement, as applied to the contract of insurance sued on is unconstitutional and in violation of Article 1, Section 10, clause one of the Federal Constitution.

(2) Did application of said statute deprive appellants of their property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution?

These questions were raised by five different assignments of error in the Supreme Court of Texas, all of them, however, being of the same purport (Rec. 91-92). In this court, additional assignments have been suggested, and which raise questions, never heretofore assigned as error arising under the Constitution of the United States in the courts below (Rec. 93-96). Such questions can not be considered in this court. The assignments of error filed in this court can not bring into the record any new matter for consideration which was not suggested as a federal question in the courts below. Waters-Pierce Oil Company vs. Texas, 212 U. S. 113, 53 L. Ed. 431. No other federal questions having been suggested or assigned in the lower courts other than those pointed out hereinabove as having been raised in the Supreme Court of Texas, therefore, such newly assigned questions will not be considered by this court. Chapin vs. Fye, 179 U. S. 126, 45 L. Ed. 119; Sawyer vs. Piper, 189 U. S. 154, 47 L. Ed. 157; Equitable Life Assurance Society vs. Brown, 180 U. S. 311, 47 L. Ed. 190. Under such circumstances it will become necessary for this court to determine whether under the assignments as made in the lower courts, it has any jurisdiction whatever to pass upon the questions raised.

"It is well settled that this court is without jurisdiction to review the judgment of a State Court on a writ of error by reason of a federal question which was not raised below or called to the attention of, or decided by the State Court." New York ex rel, vs. Kleinert, 268 U. S. 647, 69 L. Ed. 1135.

The appellants and petitioners in this case seem to have lost sight of the fact that this is a case from the Supreme Court of Texas, wherein the public policy of the

State of Texas was determined. They have briefed the case as if it was a general appeal, bringing up all questions to this court for final determination. The only questions which this court will examine into in such a case are whether or not there are federal questions which were properly assigned and in which in fact raise substantial questions arising under the laws and constitution of the United States. Corrigan vs. Buckley 271 U. S. 327, 70 L. Ed. 969. This court has no authority to examine into mere errors, if such there be, in the judgment of the Supreme Court of Texas. That court may hold a contract void, which this court might think valid, or might render a contrary holding. In respect to such things this court has no authority to interfere.

"It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decision, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary * * * The State Court * * * may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong." Still this court has no authority to revise the judgment of the State Court. Central Land Company v. Laidley, 159 U. S. 103-112, 40 L. Ed. 91.

This rule has been reiterated many times, See Lehigh Water Company vs. Easton, 121 U. S. 388, 30 L. Ed. 1059, where this court said:

"The argument in behalf of the Company seems to rest upon the general idea that this court, under the statutes defining its appellate jurisdiction, may re-examine the judgment of the State court in every case involving the enforcement of contracts. But this view is unsound."

It then followed the statement just quoted with the language herein copied from the Laidley case. And also cites many other cases laying down the same rule.

The situation with respect to this appeal is quite like that in Waters-Pierce Oil Company vs. Texas, 212 U. S. 87-97, where this court uses the following language:

"The case was submitted upon oral arguments and elaborate briefs and voluminous record. It was argued, in many aspects, as though this was a proceeding in error to review the weight of the evidence adduced in the state courts, to re-examine the rulings of the court upon the admissibility of testimony, and to **determine the effect of the statute of limitations in the state.**

and again, on page 111, of the same volume, and in the same case:

"And it is to be remembered that we are dealing with an act of the legislature, sustained in courts of the state, with reference to its validity in view of the prohibitions of the federal Constitution against deprivation of state action of liberty or property without due process of law. In this case the defendant has had a trial in a court of justice duly established under the laws of the state, the question of its liability has been submitted to a jury. The judgment has been reviewed in an appellate court, and the correctness of the findings of fact and rulings of law in the lower court affirmed. We are not prepared to say that there was a deprivation of due process of law because the statute permitted, and the court charged that there might be a conviction not only for acts which accomplished the prohibited result, but also for those which tend or are reasonably calculated to bring about the things forbidden."

If the Supreme Court of Texas had a right, as herein shown, to construe a provision in a contract as invalid and did so after a full hearing, then we are wholly unable to see how there could be any question of due process in this case. Since the early case of Hawkins vs. Barney, 5 Pet. 457, it has been held that "laws limiting the time of bring-

ing suit constitute a part of the lex fori of every country. They are laws of administering justice; one of the most sacred and important of sovereign rights and duties." This court has also said in McElmoyle vs. Cohen, 13 Pet. 312 at 326, "it would be strange if in the now well understood rights of nations to organize their judicial tribunals according to their notions of policy, it would be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts."

"Now laws of the several states have been more steadfastly or more often recognized by this court, from the beginning as rules of decision in the courts of the United States, than statutes of limitations as enacted by the legislature of a state and construed by its highest court." Balkam vs. Iron Co., 145 U. S. 177-190; 38 L. Ed. 953.

Only a few months ago this court announced the following rule:

"Here although the rights of the parties depended upon instruments the meaning and effect of which must be determined according to rules approved by the federal courts, there was no federal statute of limitation and the local one applied." Louisiana & W. Ry. Co. v. Gardiner, 273 U. S. 281, 71 L. Ed. 644.

There is no such situation here, as the rights of the parties do not depend upon matters governed by federal law and therefore clearer reason for applying the local statute. In Burnet vs. Desmornes y Alvarez, 226 U. S. 143, 57 L. Ed. 159, this court said:

"Whether prescription goes only to the remedy or extinguishes the right, it affects the jurisdiction no more than any other defense. When a court has general jurisdiction to try the question whether an alleged right exists, the rules that determine the existence of the right ordinarily govern the duty only of the court, not its power."

If the courts of Texas had jurisdiction and power to try the issue of the effect of the agreed limitation then their

judgment, even if it were wrong, could be nothing more than error over which this court has no control.

If the foregoing correctly states the law, then it is clear that this case has been passed upon by the Supreme Court of Texas on a question well within its rights and that court has held a provision in a foreign contract, that is a contract made and delivered in the Republic of Mexico, void, as being contrary to the police power, public policy and mode of practice prescribed by the statutes of the State of Texas and as such questions have been construed by its highest courts. It will be noted that appellants in their third assignment in this court refer to Article 5545 as "being a state statute of limitation of general scope." (Rec. 94).

The only theory suggested by which it could be asserted that this contract was enforceable as written, is one of comity, but comity must yield when a contract is contrary to the public policy of the state where it is sought to be enforced.

"And finally, it is certain that, as it is peculiarly within the province of the law-making power to define the public policy of the state, where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted. It is certain that these principles which govern as between countries foreign to each other apply with greater force to the relation of the several states to each other, since the obligations of the Constitution which bind them all in a common orbit of national unity impose of necessity restrictions which otherwise would not obtain, and exact a greater degrees of respect for each other than otherwise by the principles of comity would be expected." Bond vs. Hume, 243 U. S. 21-23, 61 L. Ed. 569.

"This principle is, that where the lex loci contractus and the lex fori as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land." Green vs. Van Buskirk, 72 U. S. 307, 18 L. Ed. 601. "The obligation of the sovereign to enforce his own law and to protect his own subjects is acknowledged to be paramount." Smith vs. Union Bank, 5 Pet. 525, 8 L. Ed. 215.

This court has also said in The Kensington, 183 U. S. 269, 46 L. Ed. 190:

"To state the proposition is, we think, to answer it. It is true, as a general rule, that the lex loci governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught."

A very apt statement of the law on this subject has also been made by the Court of Appeals for the State of New York, as follows:

"Notwithstanding the decisions of the courts of Pennsylvania that the contract as to arbitration was valid and enforceable in that state, judicial comity does not require us to hold that such provision of a contract which is contrary to a declared policy of our courts (authorities cited) shall be enforced as between non-residents of our jurisdiction in cases where the contract is executed and to be performed without this state, and denied enforcement when made and performed within our state." Meacham vs. Jamestown, Etc., Ry. Co., 211 N. Y. 346, Ann. Cas. 1915-C, 853.

The last named case was cited with approval by this court in Red Cross Line vs. Atlantic Fruit Company, 264 U. S. 109, 68 L. Ed. 582.

The Supreme Court of Texas held that the provision in the insurance policy sued on was in contravention of the public policy of Texas and void. They had a right to make such holding. The statute of Texas had been in effect many years, is a well recognized part of the procedure of the State and has been construed and upheld by the highest courts in Texas as applying to foreign contracts.

With reference to the police power and what comes within its domain, this court has said:

"The police power, in its broadest sense, includes all legislation and almost every function of civil government. Barkler vs. Connolly, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. Camfield v. United States, 167 U. S. 518, 524, 42 L. Ed. 260, 262, 17 Sup. Ct. Rep. 864. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. Ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175. In one of the latest utterances of this court upon the subject it was said 'whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible to circumstantial precision. It extends, we have said not only to regulations which promote the public health, morals and safety, but to those which promote the **public convenience or the general prosperity.**— And further "It is the most essential of powers, at times the most insistent, and **always one of the least limitable of the powers of government.**' " Eubank vs. Richmond, 226 U. S. 137, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914 B, 192, Sligh vs. Kirkwood, 237 U. S. 59-61, 59 L. Ed. 838.

"Chief Justice Marshall when he announced the opinion of the court (In Dartmouth College vs. Woodward),

was careful to say (page 629) that the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." Cited from Stone vs. Mississippi, 101 U. S. 814-521, 25 L. Ed. 1079.

The state police power can even be exerted over matters about which Congress has a right to legislate, so long as the Federal law-making power has left the field unoccupied. State statutes which have a tendency to regulate interstate commerce have been upheld as a proper exercise of police power of the State, particularly with respect to questions of procedure.

"Of course, in a latitudinarian sense any restriction as to the evidence of a contract, relating to interstate commerce, may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proved, does not amount to a regulation of interstate commerce." Richmond & A. R. Co. v. R. A. Patterson Tobacco Co., 169 U. S. 313-316, 42 L. Ed. 761.

In fact, in the case of Western Union Telegraph Co. v. Commercial Milling, 218 U. S. 413, 421, 54 L. Ed. 1088, this court sustained a statute of the State of Michigan with reference to a telegraph message between Detroit and Kansas City when the statute rendered void any limitation of the common law liability of the telegraph company. The case was one arising under the Constitution and laws of the United States and the Michigan Statute was sustained on the theory that said statute was a proper exercise of the police power of said state and that the limitation as to recovery in the contract was void when viewed in the light of the said statute and when being construed by the courts of that state. This court said in affirming the judgment of the Supreme Court of Michigan:

"By the law of the State, the stipulation is of no force and effect. The court so declared. It is contended here that in so doing the court was in error. It will be well to have in mind the effect of the statute as it was applied by the trial court. Undoubtedly, it was the application of a local law to the contract, but the local law does not attempt to state, measure or to establish any duty of the defendant, or to establish, define, or fix the consequences of the miscarriage. The liability, of the defendant, is established without reference to the statute. It is when it asks to be relieved therefrom, by giving effect to the stipulation, that the local law becomes, if at all, effective."

We likewise refer to the case of the Pennsylvania Ry. Company vs. Hughes, 191 U. S. 484, 48 L. Ed. 270, where this court uses the following language:

"So long as Congress has not legislated upon the particular subject, they (The statutes of the several states) are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State."

A case illustrative of how careful this court has been in upholding the rights of the states, particularly in regard to police power and questions of procedure in the State courts, is that of M. K. & T. Ry. vs. Harris, 234 U. S. 415, 58 L. Ed. 1377.

"These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power,—is not to be set aside as inconsistent with an Act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded. In Reid vs. Colorado, 187 U. S. 137, 148, 47 L. Ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, the court, speaking by Mr. Justice Harlan, said: 'It should never be held that Congress intends to super-

sede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.' This court has said—and the principle has been often reaffirmed —that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' "

Thus, we deem it proper to call the attention of the court to the fact that appellants do not claim that the situation in hand is controlled by any law of Congress, or that any federal statute has been violated, but their claim seems to be that because the clause in the contract was valid in Mexico that it is a violation of the Constitution of the United States because it is unenforceable in Texas, even though it has been expressly held by the Supreme Court of Texas to be against the public policy of that State.

We respectfully ask the court to consider in this connection appellees' "Answer to Statement as to Jurisdiction" heretofore filed. To embody same in this brief would unduly lengthen it.

POINT TWO.

As the Federal Constitution has no extraterritorial effect, it will not protect foreign contracts, and particularly is this true when they are in direct conflict with the law of the state of the forum where they are sought to be enforced.

On page 29 of the brief for appellants, the following language is used:

"Both of the Texas appellate courts have construed Article 5545, Revised Civil Statutes, 1925, as providing for extraterritorial operation and effect. Both of said courts have then held that the statute so construed, is constitutional."

We think that the appellants have misconstrued the decisions of both the appellate courts of Texas, which affirmed the judgment of the District Court on this case. They do not and have not held that Article 5545 of the Revised Civil Statutes of the State of Texas has any extraterritorial effect. The holding, however, is that when a suit is brought on a foreign contract in the Texas courts and when the Texas courts have acquired jurisdiction of the parties and the cause of action, the contract and its effect are then subject to the laws of Texas and are to be construed at least as to all questions of remedy and procedure in accordance with the statutes, and rules of procedure of that state. The matter is then not extraterritorial but becomes under such circumstances "territorial," if we may so use the word. If a contract or any provision of a foreign contract is contrary to the public policy or the statutes of the State of Texas governing procedure, such provisions will be held invalid and the contract construed as if no such provision existed. The appellants also seem to lose sight of the fact that the limitation in the contract had not expired when the appellee, C. J. Dick, returned to Texas; they also lose sight of the fact that the policy of insurance was payable to the Texas & Gulf Steamship Company, as its interest might appear (Rec. 38-39) and any such interest as the Texas & Gulf Steamship Company and C. J. Dick had, certainly arose in Texas and during the time that the policy was in full force and effect. This clearly indicates that the Mexican Company contemplated the payment in Texas of any sums that might be due, to said Texas & Gulf Steamship Company. The claim or cause of action was personal property and accompanied the appellee, Dick, to Texas.

With reference to situs of personal and movable property and claims against others, this court has held in King vs. Cross, 175 U. S. 398-401, 44 L. Ed. 213; as follows:

"The situs of movable property is at the domicile of the owner of such property, and therefore the situs of the claim or credit held by the Massachusetts firm against the Lippitt Woolen Company was not in Rhode Island, where the Lippitt Woolen Company was resident, but was in Massachusetts, where the creditor firm was established. The contention in substance is that any process of foreign attachment predicated upon the assumed right to levy on debts due to nonresidents by persons within the state wherein the process issues is absolutely void, hence a denial of due process of law.

We need not enter into a review of the contentions thus presented, since they were all considered by this court at its last term and held to be untenable. Chicago, R. I. & P. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1144, 19 Sup. Ct. Rep. 797."

"Now it is the generally accepted doctrine that, so far as so intangible a thing as a debt can be held to have a situs, it follows the creditor or owner of the credit and is at his domicile." Lancashire Insurance Company vs. Corbetts, 165 Ill. 592, 36 L. R. A. 640.

Appellee Dick had a right to bring the suit in Texas, if jurisdiction could be secured, according to the limitation and methods of practice as provided by the courts of Texas. Jurisdiction of the parties was secured. The question of jurisdiction was decided by the courts of Texas and was not assigned in the Texas courts as a federal question.

If the dissenting opinion of Mr. Justice Washington in Ogden vs. Saunders, 12 Wheat 213, 255, cited by appellants, holds what they contend for, and should be of any effect whatever, it would still be very far from holding that the obligation of a contract made in a foreign country is protected by the Constitution of the United States. He was there referring to contracts made within the United States but in states foreign to each other in the sense of separate states. It will be noted in Munday vs. Wisconsin Trust Company, 252 U. S. 501-503, 64 L. Ed. 686, this court

speaking through Mr. Justice McReynolds held that statutes of Wisconsin in force when contracts were made in Illinois and which invalidated said contracts did not run counter to the contract or due process clauses in the Constitution.

The laws and Constitution of the United States do not have any extraterritorial effect. American Banana Company vs. United Fruit Company, 213 U. S. 353, 355, 53 L. Ed. 826. The contention made by the appellants in all of the Texas courts and in this court, that the contract was valid and governed by the law of Mexico, certainly is, in itself, a denial of their position that the Constitution of the United States protects the obligation of the contract sued on. A judgment obtained in a foreign country does not have the guaranty of the Constitution of the United States and is not protected by that instrument. Aetna Life Insurance Company vs. Tremblay, 223 U. S. 185, 56 L. Ed. 398. The effect of the legislation of a foreign country is not guaranteed by the Constitution of the United States. League vs. Young, 11 How. 185, 13 L. Ed. 657. On numerous occasions contracts of seamen have been held invalid when a foreign ship comes into our territory and so long as the foreign ship remains in our territory, even though such contracts are absolutely valid and binding where made. The reason is that when they come under the influence of our laws the comity accorded to such contracts must yield and our own laws become effective. Practically the same rule is laid down in Cunard Steamship Co. vs. Mellon, 262 U. S. 119, 67 L. Ed. 894. So in the case at bar, C. J. Dick, a citizen of Texas, left Mexico shortly after the fire causing his loss, (Rec. 10), and came to Texas where he has always resided except for his temporary absence in Mexico. The situs of his claim against the Mexican Insurance Company followed him to Texas and the laws of Texas had the im-

mediate effect of rendering the clause, relied upon by the appellants, void long before the policy would have been barred by limitation even by the law of Mexico.

Under such circumstances this court has held as follows:

"If he (the plaintiff) had, before the expiration of the period limited by the law of Tennessee quitted his residence in Missouri and joined his family in New York for the purpose of making the latter state his residence in fact, he would have been entitled to bring his action within the period fixed by the laws of New York for the commencement of actions like this by one who is a resident of that state when the cause of action accrues." Penfield vs. C. O. & S. W. Ry. Co., 134 U. S. 351, 33 L. Ed. 940.

The same rule has been laid down in the following cases: Atchison, Topeka & S. F. Ry. vs. Mills, 53 Tex. Civ. Apps. 359; 116 S. W. 852; Smith vs. Webb (Tex. Civ. Apps.) 181 S. W. 820; Canadian Pac. Ry. Co. v. Johnston, 61 Fed. 738, 9 C. C. A. 587; Finnel vs. Southern Kansas Ry. Co., 33 Fed. 427; Moores vs. Winter, 67 Ark. 189, 53 S. W. 1057; Alexander vs. Burnett, 39 S. C. L. 189; Huber vs. Steiner, 2 Bing. (N. C.) 202, 29 E. C. L. 501, 132 Reprint 80. On this question the Supreme Court of Texas followed the above cases. Its opinion on this subject is as follows:

"However, even if it should be held that there is a distinction to be drawn between a prescriptive statute that kills the cause of action, and a statute of limitation that merely bars the right of recovery by limitation where limitation is pleaded, still in this case the result would be the same as it is shown that Dick removed from Mexico a few days after the boat in question was destroyed, and has lived in Texas ever since. Under such circumstances a prescriptive statute of Mexico would be no defense in the courts of Texas. 37 C. J. 732, Sec. 50, and notes; Ry. Co. v. Mills, 116 S. W. 853, (Civ. App. writ ref'd.) * * *

Of course, had both parties remained in the Republic of Mexico until the bar of the statutes of that country had actually and fully operated, a different question would be presented; and, under the rule that where personal property is held adversely in one state for a sufficient length of time to acquire title thereto by prescription or limitation, such title will be recognized in other states, it might be that, under the statutes of Mexico, and the contract in question, this cause would be barred in Texas, 37 C. J. 732, Sec. 50. No such question is presented in this case." (Rec. 80-81.)

That the same rule applies to contracts as well as in torts is shown in Canadian Pac. Ry. Co. v. Johnston, supra, where Judge Shipman, of the Second Circuit considers this matter quite fully. He sets out on page 742 (Fed. Rp. 61) the code of Canada:

"Art. 2262. The following actions are prescribed in one year: For slander or libel, reckoned from the day it came to the knowledge of the party aggrieved. For bodily injuries, saving the special provisions contained in Article 1056, and cases regulated by special laws."

"Art. 2267. In all cases mentioned in articles 2250, 2260, 2261 and 2262, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired."

The Canadian statute is much more a statute of extinguishment than either the Mexican Statute or the agreed limitation clause relied on by appellants.

In discussing this question, on page 745, it is said:

"No testimony was given in regard to the construction of the statute by the Canadian courts, and we have not found a controlling authority in the decisions of other courts, as to the construction of statutes, which use similar language. The statute purports to be one of extinguishment, but the prescription may be interrupted by acknowledgement on the part of the possessor or debtor, or the debt or claim may be revived after the prescription

has run. The argument, therefore, is that, if the debt may be revived, after the full time of prescription has elapsed, the statute is not one of extinguishment. This suggestion does not meet the question, which, it is true, does not arise in this case but which often may arise, and which is, what is the effect of the statute, when pleaded and shown, in an action in a foreign country, upon a debt due from a citizen of Canada to a citizen in Canada, when the time of prescription has run before suit, without interruption, while both parties resided in Canada, and the debt has never been revived? In the case of Bulger v. Roche, supra, the debt was contracted between subjects of Novia Scotia, who remained there until the debt was extinguished by virtue of its statute of limitations; but, in the opinion of Chief Justice Shaw, the statute created no legal defense to an action by the creditor in the state of Massachusetts. The court treated the question as one arising under an ordinary statute of limitations, which merely affected the remedy. But without attempting to pass upon what may be the effect of the statute under all circumstances, it is sufficient to say that, assuming that it possesses its largest character, and is a statute of extinguishment, it constitutes no defense to the suit of this plaintiff in the State of Vermont, because during the plaintiff's residence in Canada, it has not become operative, and had not extinguished the debt, so far as courts in states foreign to Canada are concerned. The injury happened on Sept. 6, 1890. The plaintiff was at that time a citizen of Vermont, but after the injury, he remained in Canada until April, 1891, when he returned to his mother's and his own home, in Vermont and remained there continuously thereafter. When, before a statute of limitations has become operative, by way of extinguishment of the debt, as between two citizens or residents of a state, one of the parties has permanently changed his national domicile, and become a citizen of a foreign state, the statute will not become an absolute bar, as an extinguishment in the courts of such foreign state. It cannot become, in the country to which he has removed, an absolute extinguishment, unless the parties resided in the country of the statute during the whole period of limita-

tion. Wood, Lim. Act. 22. The reasoning which leads to this result is stated by Judge Story in his Conflict of Laws (Sec. 582)."

As the citation from Judge Story's work following the foregoing is very lengthy and may be found in full on page 746 of Judge Shipman's opinion, we do not desire to burden this brief by copying it herein.

POINT THREE

The contractual provision was purely a clause of limitation and applied to the remedy only. In any event the State Courts had a right to so construe the contract.

(See authorities and argument under following point.)

POINT FOUR

Even if it should be held that the provision in reference to limitation was a substantive part of the contract, yet such provision is in direct contravention to the policy of the State of Texas, as declared by its laws and the decisions thereunder, and the courts of Texas will not be compelled to enforce any law that is against the public policy of the state.

The clause relied on in the contract providing that suit must be brought within one year, pertained exclusively to the remedy. It had nothing to do with the substance of the Contract, had no reference to the principal subject in hand and came into use only in the event that a loss occurred and suit should be filed. The Supreme Court of Appeals in Virginia on the same question held as follows:

"If, therefore, we were dealing with a case of limitation by statute, we should deem the authorities already cited as conclusive upon the subject. Is there any essen-

tial difference between a limitation imposed by statute, and that which is imposed in a stipulation entered into by the parties? Undoubtedly, the object and effect are the same, and the one as well as the other operates only upon the remedy. A contract entered into is presumed to be made with reference to existing laws, and yet it is well established that those laws may be altered, amended, or repealed without affecting the binding force of the contract, so long as a sufficient remedy is left for its enforcement." Smith vs. Northen Neck Mt. F. Ass'n., 112 Va. 192, 70 S. E. 482, 38 L. R. A. (N. S.) 1019.

Matters of this character, therefore, have reference to the remedy only. Arbitration clauses have been held to be remedial by this Court. Red Cross Line vs. Atlantic Fruit Company, 264 U. S. 109, 68 L. Ed. 582. The statutes of frauds relate to the remedy and the lex fori controls. Rantoul vs. Claremont Paper Company, (C. C. A.) 196 Fed. 305; Buhl vs. Stephens, 84 Fed. 922; Straesser-Arnold Co. v. Franklin Sugar Company (C. C. A.) 8 Fed. (2) 601. "A confession of judgment pertains to the remedy. A person seeking to enforce here a contract made in another state must do so in accordance with the laws of this state. Parties can not, by contract made in another state, engraft upon our procedure here remedies which our laws do not contemplate or authorize." Hamilton vs. Schoenberger, 47 Iowa 385-7. Likewise it has been held that remedies on auxiliary agreements, the obligation of which does not arise until the remedy is sought upon the contract, are to be governed by the law of the forum. Commercial National Bank vs. Davidson, 18 Oregon, 57, 22 Pac. 517. The Supreme Court of Texas had a right under the authorities to hold as it did that the clause with reference to suit being brought within one year was not a substantive part of the contract, but pertained only to the remedy. But, granting for the sake of argument that the one-year clause in question might be construed by

this court as a substantive part of said contract and not one pertaining to the remedy only, still this court would not require its enforcement even if the question were one originally tried in the federal courts, because said clause is in violation of the public policy of Texas. Union Trust Company vs. Grosman, 245 U. S. 412, 62 L. Ed. 368. In that case a contract valid under the laws of Illinois where made was refused enforcement in the federal courts of Texas and this court as to Mrs. Grosman because it was contrary to the public policy of Texas. This court holding that though the contract was valid where made, nevertheless it must yield to the public policy of Texas.

The Supreme Court was well within its rights in construing the limitation clause as a part of the remedy even if this court would have held differently. That court was construing the contract in connection with a State statute and was passing on the effect of the state statute upon the contract. They, of course, held valid their own "statute of limitation of general scope" and also held that the clause in the contract was invalidated thereby.

"Every nation • • • has (as has often been said) a right to protect itself and its citizens against the inequality of foreign laws which are injurious to their interests." Walworth vs. Harris, 129 U. S. 355, 32 L. Ed. 712.

The settled rule of this court is well expressed in Manigault vs. Springs, 199 U. S. 473, 50 L. Ed. 274, as follows:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be effected. This power, which, in its various ramifications, is known as the police power, is an exercise

of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."

"We may not test in the balance of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body." Standard Oil Co. vs. Marysville, 279 U. S. 582, 73 L. Ed. 857.

"It is well established by repeated decisions of this court that neither of these provisions (due process and cantract clauses) of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety or general welfare of the community." Chicago & A. Ry. Co. v. Transbarger, 238 U. S. 70-77.

In other words, the public policy and police power of the several states are supreme unless they run counter to some question over which Congress has exclusive control, and in that case even, as hereinbefore shown, this court will look with considerable solicitude upon the question before overturning a decision of the State based upon such power.

The following general rule is laid down in 5 R. C. L. 944:

"The public policy of a State, established either by express legislative enactment, or by the decisions of its courts, is supreme, and when once established will not, as a rule, be relaxed even on grounds of comity to enforce contracts, which, though valid where made, contravene such policy."

This doctrine is supported by decisions from practically every state in the Union.

We believe about the best illustration we can give that a federal question is not necessarily involved in this case is to call attention to the fact that the Court of Ap-

peals of New York decided that short and unreasonable stipulations in foreign bills of lading as to time for bringing suit were void as contrary to the public policy of that state. South and Central American Commercial Company vs. Panama Ry. Co., 237 N. Y. 287, 142 N. E. 666. This conclusion was not based on a statute. In our case the decision was based on a statute. In each case the effect was the same. Each was declaring the public policy of the State, each was doing something within its police power, "one of the least limitable of the powers of government." Sligh vs. Kirkwood, supra.

POINT FIVE.

The appellants have been accorded due process of law in the Courts of Texas.

"Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law." Corrigan vs. Buckley, 271 U. S. 327, 70 L. Ed. 973.

On the question of due process this court has up to this time "sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial and held them to be consistent with due process. * * * Without attempting to define exactly in which due process of law consists, it is sufficient to say, if the Supreme Court of a State has acted in consonance with the Constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test." Jordan vs. Massachusetts, 225 U. S. 174, 56 L. Ed. 1041. "Due process only requires that there shall be a regular course of proceeding in which notice

is given of the claim asserted." Simon vs. Craft, 182 U. S. 431-6, 45 L. Ed. 1166. "The fundamental requisite of due process is the opportunity to be heard." Grannis vs. Ordean, 234 U. S. 386; 58 L. Ed. 1368-9. "Here the State Court has decided that the proceeding below was in accordance with the laws of the State and we do not find them to be contrary to the Constitution or any law or treaty of the United States." Walker & Sauvinet, 92 U. S. 90-93, 23, L. Ed. 678. "Error of the trial judge in admitting evidence or in entering judgment after full hearing does not constitute a denial of due process of law." Jones vs. Buffalo Coal and Coke Company, 245 U. S. 328, 61 L. Ed. 325. "The plaintiff in error thus sought in the State Court and was given opportunity to litigate the rights claimed by it and it cannot complain that the guaranties of the Constitution of the United States were denied because the litigation did not result successfully." Remington Paper Co. v. Watson, 173 U. S. 443, 43 L. Ed. 762.

"The Fourteenth Amendment is relied upon as invalidating such legislation. That forbids a State to 'Deprive any person of life, liberty or property without due process of law.' And the proposition is, that the denial of a right to be heard before judgment simply as to the sufficiency of the service operates to deprive the defendant of liberty or property. But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is only when process is issued thereon, or the judgment is sought to be enforced, that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the Amendment is preserved, and there is no just cause of complaint. The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. Antoni v. Greenhow, 107 U. S. 769 (27:468)." Cited

from F. B. York vs. State of Texas, 137 U. S. 15-21, 34 L. Ed. 607.

(See also authorities cited under Point One.)

POINT SIX.

The judgment of the courts of Texas against the American insurance companies as garnishees was rendered in full compliance with its law and jurisdiction properly and lawfully acquired over the American insurance companies, because immediately upon the total loss of the vessel a debt accrued from the re-insurance companies to the Mexican Company and this debt the appellee had a right to subject to his claim by garnishment in accordance with the laws of the State.

We are not going to undertake to answer paragraph by paragraph or decision by decision the very learned and exhaustive brief of appellants. To discuss each case would lengthen this brief to an unwarranted extent. Many cases cited by them on the question of construction of agreed limitations involve instances where the State has no statutory enactment like the one in Texas and where there is no public policy on the subject. The decisions of other courts would be wholly irrelevant and immaterial as to the case at bar because each state has a right to say what its own public policy, police power and rules of procedure shall be. These things might, or might not be considered extreme and fanciful by other courts. That, however, is not the question, the question is whether or not the State had a right to pass the statute and whether or not it has a right to construe it as it did. We also think it relevant, in view of the large number of cases cited by appellants which are not appropriate to the peculiar circumstances of this case, to suggest that the fact that this court approves a case from a state court or cites a decision from New

York for example, does not make such decision the law or relevant authority in respect to a question of practice or rule of property when passing on a case from another state. The fact that a case is affirmed does not necessarily mean that this court would have held the same thing as a matter of general or common law as is well illustrated in Pennsylvania Ry. Co. v. Hughes, supra, nor does the law so laid down, or affirmed, necessarily become the national law. The only conclusion to be drawn is that this court approves the decision of the State Court as not being contrary to the Federal constitution.

Appellants refer to the case of Travelers Insurance Company vs. Suggs, 71 Texas 579, as being relevant in this connection. That case was tried prior to the enactment of Article 5545. The law in Texas was the same as that laid down in the Riddlesbarger case, until the enactment of Article 5545. And by the way the decision in the Riddlesbarger case was one of general law upon which question the State and Federal courts have a right to differ. Each, within their own sphere and within the same State, may hold differently upon the same question. The decision in Suggs case and the decision in Armstrong vs. G. H. & S. A. Ry. Co., 92 Tex. 121, and in the case at bar, show clearly that the Supreme Court of Texas felt that it was their duty since the legislature had spoken, to follow the rule as declared by the legislature and to depart from the decisions such as the Suggs case rendered prior to the enactment of that statute.

That an agreed limitation does not extinguish a claim as a matter of general or common law, even under the decisions of this court, is fully illustrated by the case of Semmes vs. City Fire Insurance Company of Hartford, 80 U. S. 531-568, 20 L. Ed. 491, cited and relied upon by appellants. Each case is to be decided upon its peculiar facts and the law under which the case is tried.

We respectfully suggest that decision in the case at bar is no novel departure from the decisions under like statutes. The rule herein applied prevails in Alabama. Galliher vs. State Mutual Life Insurance Company, 150 Ala. 543, 124 Am. St. Rep. 83. In that case the Supreme Court of Alabama held void a contractual limitation in an insurance policy issued in Georgia. In Virginia the Supreme Court of Appeals held void a contractual limitation in a policy when said limitation was valid at the time the policy was issued. Smith vs. Northern Neck Mt. Fire Association, 112 Va. 192, 77 S. E. 483, 38 L. R. A. (N. S.) 1019. In Kansas the Supreme Court of that State held the contractual limitation in a contract issued in Pennsylvania void because in contravention of a statute like ours. Hornick v. First Catholic Slovak Union, 115 Kan. 597, 224 Pac. 486. In the latter case 7 Cooley's Brief on Law of Insurance, 1673, and 5 Joyce on Insurance, par. 3224, are both cited as sustaining the rule followed in this case. And in New York in South and Central American Commercial Company vs. Panama R. Co., 237 N. Y. 287, 142 N. E. 666, the New York Court of Appeals holds as a matter of public policy even without statutory basis, that short stipulations in foreign bills of lading are void in that State though valid where made. The rule is also sustained in 14 Ruling Case Law, 1418, par. 580, as follows:

"The limitation, by contract, of the time within which an action may be brought on an insurance policy may be, and has sometimes been, prohibited by statute, and such a statute may be applied to existing policies without impairing the obligation of the contract. Such a statute relates to the remedy, and applies to an action within the state on a foreign contract."

and also in 13 C. J. 260, it is said:

"The validity of a contract limiting the time for bringing action is governed by the law of the forum."

Not only have many States passed such legislation evidencing their public policy but Congress has seen fit to enact a similar statute with respect to clauses in bills of lading regarding the time for filing suits against transportation and railway companies engaged in interstate commerce. 49 U. S. C. A. page 75, Sec. 20, par. 11. Texas, being a border state, has had many cases decided in her courts involving contracts arising in Mexico. A good illustration is that of Banco Minero vs. Ross, 172 S. W. R. 711, where suit was originally begun by publication and writ of garnishment against bank stock in an El Paso bank belonging to the non-resident in Mexico.

We had thought that the question of jurisdiction of the American Companies was settled in the Supreme Court of Texas when it was held therein that the courts of Texas did have jurisdiction and when such holding was not assigned as error arising under the Constitution and laws of the United States (Rec. 91-92). Litigants have a perfect right to waive federal and constitutional questions, Harding vs. Illinois, 196 U. S. 82-88, 49 L. Ed. 395; Pierce Oil Co. v. Phoenix Refining Co., 259 U. S. 125, 66 L. Ed. 855; Pierce v. Summerset Ry. Co., 171 U. S. 648, 43 L. Ed. 316. We know of no better method of waiving federal questions than by failing to assign them as such in the State Courts. "That a party has taken the question of jurisdiction to a higher court is bound by its decision, was held in Forsyth vs. Hammond, 166 U. S. 506-17, 41 L. Ed. 1095-1099, 17 Sup. Ct. Rep. 665." Cited from Chicago Life Insurance Company vs. Cherry, 244 U. S. 28-30. Thus we think that the appellants are precluded by not having assigned this issue in the Supreme Court of Texas as federal error, but, if this court should disagree with us, then we suggest that there is no doubt but that the American Insurance Companies were in court by due and legal service. They do not question this. They denied that they

owed the Mexican companies anything. (Rec. 14-16). This was controverted by the plaintiff, C. J. Dick (Rec. 17-19) who set up in his controverting affidavit provided for by the garnishment laws of Texas, that each of the American companies was indebted to the Mexican company in the sum of $15,000.00. This issue was tried out and the District Court found that the two American companies were each indebted to the Mexican company in the sum of $15,000.00. This holding was based upon a long line of State cases which culminated in this court in the case of Allemannia Fire Insurance Company vs. Firemen's Insurance Company, 209 U. S. 326, 52 L. Ed. at page 815. This court has also recently affirmed the Allemannia Case, in Hicks vs. Poe, 269 U. S. 118-121, 70 L. Ed. 187 where Mr. Justice Brandeis says that such questions, that is questions involving the rights between original insurers and reinsurers, are not federal in their nature.

We think that the Supreme Court of Texas in its opinion has laid down a very clear and logical conclusion on the question of garnishment which is fully sustained by both State and Federal authorities. Garnishment is a question of remedy and is governed by statutory enactments and the decisions of the highest courts of the different states. The garnishment laws of Texas are quite liberal and a garnishment has been construed to be in the nature of a bill of discovery. The leading case on this subject is that of Phenix Insurance Company of Brooklyn vs. P. J. Willis Bros. 70 Tex. 12. In that case the court uses this language:

"But we are of opinion that the issuance of a writ of garnishment is not strictly speaking an action for the recovery of a debt, but is more in the nature of a bill of discovery, and may be filed in anticipation that a debt or other obligation will mature at some future time. This practice is evidently contemplated by our statute of gar-

nishment. In this instance, the property having been destroyed by fire, the agreement to pay the policy was no longer contingent, but had become absolute by the happening of the event mentioned in the policy, subject to be defeated, however, by defenses pleaded and proven, as might be done in other cases of debt. Consequently the garnishment was not prematurely issued."

The Court of Civil Appeals at San Antonio, in Gordon, et al, vs. Litwood Oil & Supply Co., 261 S. W. 400, says:

"Although it had not been determined how much the insurance company owed Phillips or whether it owed anything, the writ of garnishment was not prematurely issued. As soon as the automobile was burned, the agreement to pay the policy was not a contingency, but was absolute, subject to being defeated by defenses that might have, but did not, arise. Phenix Ins. Co. v. Willis, 70 Tex. 12."

The only question for the lower courts to decide in this case, therefore, was whether or not a debt existed from the American companies (garnishees) to the Mexican company. The claim sued on was held by Supreme Court of Texas to be a liquidated demand. (Rec. 83).

Appellants suggest that there is a distinction between garnishments where the debt is admitted and where it is denied. If this were true the garnishee could by its own act of denying the liability to the original defendant defeat jurisdiction. We can see no basis for any such contention, particularly since the laws of the State provide that the answer may be controverted and issue tried. Appellants also refer to the case of Morris vs. Scandinavian Insurance Company, a case involving a question of procedure and lawful service of process in the federal courts, and wherein it is stated that there is no privity between the insured and the reinsurer. Appellees have never

claimed that there was such privity. This lack of privity was the very reason that suit was not brought directly against the reinsurers. If there had been any privity between the insured and the reinsurers we would not have brought the suit in the State court in the form of garnishment but would have proceeded directly against the reinsurers. Garnishment is a method provided by law for reaching effects in the hands of those who are not in privity with the plaintiff bringing the suit. Garnishment is intended for the purpose of reaching funds, effects and credits which could not be reached except by the roundabout method of suing the original defendant and issuing garnishment against those who owe the original defendant. Each state has a right to say just what shall be subject to garnishment and how the funds may be reached. Each state also has a right to say just how far garnishment may be used to reach funds in the hands of corporations doing business in their state and belonging to nonresidents. The garnishees are not thereby brought into privity but the plaintiff under the garnishment laws is given the right to foreclose on debts which the garnishees owe to the original defendant. These matters are so plain and fundamental that we would hardly think citation of authorities necessary. The fund found due from the reinsurers to the original insurer was foreclosed on. This is a remedy allowed by the laws of the State of Texas and on this no federal question is involved. Appellants insist that a great national question is involved in this case with respect to the rights arising between the reinsurers and the original insured. The question involved is only one of the indebtedness of one party to another and the right of the plaintiff to foreclose on same.

"It may be said to be the general rule that the right which the insured possesses against an insurance company under a policy of insurance on property is subject to gar-

nishment at the suit of creditors of the insured." 12 R. C. L. 804.

We know of no reasons, and petitioners have pointed out none, why the reinsurance companies should have any special privilege not accorded to the original insurance company and why they should not be subject to garnishment proceedings with respect to debts due by them to others. Certainly there is no inhibition in the Constitution on this subject.

Practically the same result has been reached in other jurisdictions as in this case by an assignment from the original insurer and a suit by the original insurer against the reinsurer. Consolidated Real Estate Ins. Co. v. Cashow, 41 Md. 59-78; Cass County vs. Mercantile Town Mutual Ins. Co., 188 Mo. 1, 86, S. W. R. 237. As suggested by this court in Hicks vs. Poe, supra, such questions are not federal in their nature.

It would be hard for us to believe that this court would overrule what it has held in Chicago R. I. & P. Ry. Co., vs. Sturm, supra, and approved in King vs. Cross, supra, with respect to the situs of a debt and as to the right of the creditors residing in one State, to issue garnishments on indebtedness belonging to non-residents, and to foreclose upon same through the regular course of procedure in the State Courts. Such procedure was held to be "due process of law," in spite of the fact that in the Sturm case no recovery could have been had in the domicile of the non-resident defendant because the money was exempt. In the Sturm case, Berry vs. Davis, 77 Tex. 191, was approved. That case was one where garnishment was issued against a debt due to a non-resident and the practice was approved by the Supreme Court of Texas. It is a matter of common knowledge that recoveries have often been allowed in a state or country other than the debtor's domicile, when no recovery could have been had in such

domicile because the debt was barred by limitation in the latter state. Judgment for debt can be recovered wherever jurisdiction of a party or his property or debts due him can be acquired. It is not essential that recovery could have been had in the Courts of the debtor's domicile.

WHEREFORE, appellees pray that the court consider in connection with this brief their "Answer to Statement as to Jurisdiction" and their "Answer to Petition for Writ for Certiorari" and that upon the hearing hereof that this cause be dismissed for want of jurisdiction, or in the alternative if this court should find that it has jurisdiction, that this cause be affirmed.

Respectfully submitted,

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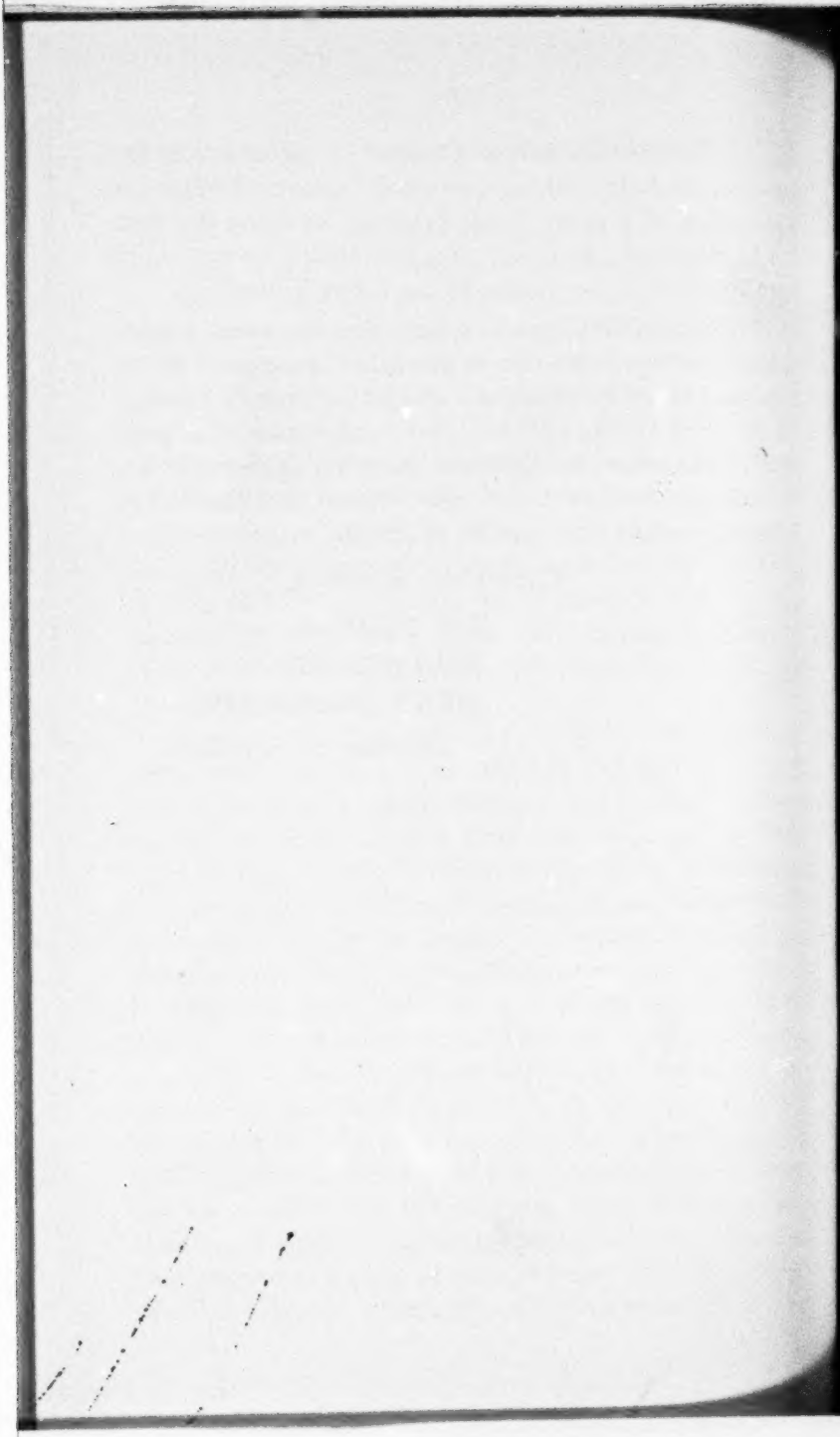

SUPREME COURT OF THE UNITED STATES.

No. 232.—October Term, 1929.

The Home Insurance Co., et al., Appellants, *vs.* C. J. Dick et al. } Appeal from the Supreme Court of Texas.

[May 5, 1930.]

Mr. Justice Brandeis delivered the opinion of the Court.

Dick, a citizen of Texas, brought this action in a court of that State against Compania General Anglo-Mexicana de Seguros S. A., a Mexican corporation, to recover on a policy of fire insurance for the total loss of a tug. Jurisdiction was asserted *in rem* through garnishment, by ancillary writs issued against The Home Insurance Company and Franklin Fire Insurance Company, which reinsured, by contracts with the Mexican corporation, parts of the risk which it had assumed. The garnishees are New York corporations. Upon them, service was effected by serving their local agents in Texas appointed pursuant to Texas statutes, which require the appointment of local agents by foreign corporations seeking permits to do business within the State.

The controversy here is wholly between Dick and the garnishees. The defendant has never been admitted to do business in Texas; has not done any business there; and has not authorized anyone to receive service of process or enter an appearanec for it in this cause. It was cited by publication, in accordance with a Texas statute; attorneys were appointed for it by the trial court; and they filed on its behalf an answer which denied liability. But there is no contention that thereby jurisdiction *in personam* over it was acquired. Dick's claim is that, since the obligation of a reinsurer to pay the original insurer arises upon the happening of the loss and is not conditional upon prior payment of the loss by the insurer, *Allemannia Fire Insurance Co.* v. *Firemen's Insurance Co.*, 209 U. S. 326; *Hicks* v. *Poe*, 269 U. S. 118, the New York companies are indebted to the Mexican company and these debts are subject to garnishment in a proceeding against the latter *quasi in*

rem, even though it is not suable *in personam*. The garnishees concede that inability to sue the Mexican corporation in Texas, *in personam*, is not material, if a cause of action against it existed at the time of garnishment and there was within the State a *res* belonging to it. But they deny the existence of the cause of action or of the *res*.

Their defense rests upon the following facts. This suit was not commenced till more than one year after the date of the loss. The policy provided: "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs." This provision was in accord with the Mexican law to which the policy was expressly made subject.[1] It was issued by the Mexican company in Mexico to one Bonner, of Tampico, Mexico, and was there duly assigned to Dick prior to the loss. It covered the vessel only in certain Mexican waters. The premium was paid in Mexico; and the loss was "payable in the City of Mexico in current funds of the United States of Mexico, or their equivalent elsewhere."[2] At the time the policy was issued, when it was assigned to him, and until after the loss, Dick actually resided in Mexico, although his permanent residence was in Texas. The contracts of reinsurance were effected by cor-

[1]The policy contained also the provision: "The present policy is subjected to the disposition of the Commercial Code, in that it does not alter or modify the stipulations which that same contains." The dispositions of the Commercial Code thus incorporated are: "Article 1038. The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code. Article 1039. The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against same is given. Article 1043. One year shall prescribe actions derived from contracts of life insurance, sea and land."

[2]The loss was made payable to Dick and the Texas and Gulf Steamship Co. as their interests might appear. The Steamship Company and Suderman & Young, Inc., assignee of part of the cause of action, intervened as plaintiffs and are joined with Dick as appellees. As there are no rights peculiar to them, they need not be further referred to. Dick contends that since the policy was payable to the Texas and Gulf Steamship Co., the contract was performable in Texas. The contention is in conflict with the quoted language of the policy and there is no provision otherwise lending support to the argument. Texas is nowhere mentioned in the policy. Moreover, there is nothing in the record to show that the Steamship Company's sole place of business was in Texas. The State courts made no findings on this claim.

respondence between the Mexican company in Mexico and the New York companies in New York. Nothing thereunder was to be done, or was in fact done, in Texas.

In the trial court, the garnishees contended that since the insurance contract was made and was to be performed in Mexico, and the one year provision was valid by its laws, Dick's failure to sue within one year after accrual of the alleged cause of action was a complete defense to the suit on the policy; that this failure also relieved the garnishees of any obligation as reinsurers, the same defense being open to them, *New York State Marine Ins. Co.* v. *Protection Ins. Co.*, 1 Story 458, 460; and that they, consequently, owed no debt to the Mexican company subject to garnishment.[3] To this defense, Dick demurred, on the ground that Article 5545 of the Texas Revised Civil Statutes (1925) provides: "No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract, or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this State."

The trial court sustained Dick's contention and entered judgment against the garnishees. On appeal, both in the Court of Civil Appeals (8 S. W. (2d) 354) and in the Supreme Court of the State (15 S. W. (2d) 1028), the garnishees asserted that, as construed and applied, the Texas statute violated the due process clause of the Fourteenth Amendment and the contract clause. Both courts treated the policy provision as equivalent to a foreign statute of limitation; held that Article 5545 related to the remedy available in Texas courts; concluded that it was validly applicable to the case at bar; and affirmed the judgment of the trial court. The garnishees appealed to this Court on the ground that the statute, as construed and applied, violated their rights under the Federal Constitution. Dick moved to dismiss the appeal for want of jurisdic-

[3]Besides the defense here discussed the answers both of the Mexican corporation and of the garnishees alleged: (2) that the suit was not brought within the period provided by the Commercial Code of Mexico, and that thereby the right of action was completely barred upon the expiration of one year; (3) that the policy was void because of plaintiff's misrepresentations as to the value of the vessel; (4) that the vessel was not a total loss and was abandoned in violation of the terms of the policy. None of these defenses needs to be considered.

tion. Then the garnishees filed, also, a petition for a writ of certiorari. Consideration of the jurisdiction of this Court on the appeal, and of the petition for certiorari, was postponed to the hearing of the case on the merits. 280 U. S. —.

First. Dick contends that this Court lacks jurisdiction of the action, because the errors assigned involve only questions of local law and of conflict of laws. The argument is that while a provision requiring notice of loss within a fixed period, is substantive because it is a condition precedent to the existence of the cause of action, the provision for liability only in case suit is brought within the year is not substantive because it relates only to the remedy after accrual of the cause of action; that while the validity, interpretation and performance of the substantive provisions of a contract are determined by the law of the place where it is made and is to be performed, matters which relate only to the remedy are unquestionably governed by the *lex fori*; and that even if the Texas court erred in holding the statute applicable to this contract, the error is one of state law or of the interpretation of the contract, and is not reviewable here.

The contention is unsound. There is no dispute as to the meaning of the provision in the policy. It is that the insurer shall not be liable unless suit is brought within one year of the loss. Whether the provision be interpreted as making the commencement of a suit within the year a condition precedent to the existence of a cause of action, or as making failure to sue within the year a breach of a condition subsequent which extinguishes the cause of action, is not of legal significance here.[4] Nor are we concerned with the question whether the provision is properly described as relating to remedy or to substance. However characterized, it is an express term in the contract of the parties by which the right of the insured and

[4]That a provision requiring notice of loss within a fixed period and one requiring the bringing of suit, stand upon the same footing was held in *Riddlesbarger* v. *Hartford Insurance Co.*, 7 Wall. 386, 390. Compare *Semmes* v. *Hartford Insurance Co.*, 13 Wall. 158, 161. The validity and effectiveness of a clause limiting the time for suit, in the absence of a controlling statute, was recognized also in Texas, *Suggs* v. *Travelers Insurance Co.*, 71 Texas 579. In that case, decided before the enactment of Article 5545, the Texas court upheld a similar provision in an insurance policy against the claim of an infant without capacity to sue. The court described the nature of the provision thus (p. 581): "It is said to differ from the statutory limitation in this, that it does not merely deny the remedy, but forfeits the liability when the suit is not brought within the stipulated time."

the correlative obligation of the insurer are defined. If effect is given to the clause, Dick cannot recover from the Mexican corporation and the garnishees cannot be compelled to pay. If, on the other hand, the statute is applied to the contract, it admittedly abrogates a contractual right and imposes liability, although the parties have agreed that there should be none.

The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked. Nor does it govern only the remedies available in the Texas courts. It deals with the powers and capacities of persons and corporations. It expressly prohibits the making of certain contracts. As construed, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for. Therefore, the objection that, as applied to contracts made and to be performed outside of Texas, the statute violates the Federal Constitution, raises federal questions of substance; and the existence of the federal claim is not disproved by saying that the statute, or the one year provision in the policy, relates to the remedy and not to the substance.

That the federal questions were not raised in the trial court is immaterial. For, the Court of Civil Appeals and the Supreme Court of the State considered the questions as properly raised in the appellate proceedings and passed on them adversely to the federal claim. *Chicago, Rock Island & Pacific Ry. Co.* v. *Perry*, 259 U. S. 548, 551; *Sully* v. *American National Bank*, 178 U. S. 289, 298. The case is properly here on appeal. The motion to dismiss the appeal is overruled; and the petition for certiorari is, therefore, denied.

Second. The Texas statute as here construed and applied deprives the garnishees of property without due process of law. A State may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of

re-insurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law. *Compañía General de Tabacos* v. *Collector of Internal Revenue,* 275 U. S. 87; *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389; *New York Life Ins. Co.* v. *Dodge,* 246 U. S. 357. Compare *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544, 551.[5]

The cases relied upon, in which it was held that a State may lengthen its statute of limitations, are not in point. See *Atchafalaya Land Co.* v. *Williams Cypress Co.,* 258 U. S. 190; *National Surety Co.* v. *Architectural Decorating Co.,* 226 U. S. 276; *Vance* v. *Vance,* 108 U. S. 514. In those cases, the parties had not stipulated a time limit for the enforcement of their obligations. It is true that a State may extend the time within which suit may be brought in its own courts, if, in doing so, it violates no agreement of the parties.[6] And, in the absence of a contractual provision, the

[5]The division of this Court in the *Tabacos* and *Dodge* cases was not on the principle here stated, but on the question of fact whether there were in those cases things done within the State of which the State could properly lay hold as the basis of the regulations there imposed. Compare *Bothwell* v. *Buckbee, Mears Co.,* 275 U. S. 274; *Palmetto Fire Ins. Co.* v. *Conn,* 272 U. S. 295. In the absence of any such things, as in this case, the Court was agreed that a State is without power to impose either public or private obligations on contracts made outside of the State and not to be performed there. Compare *Mutual Life Insurance Co.* v. *Liebing,* 259 U. S. 209; E. Merrick Dodd, Jr., "The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws," 39 Harv. L. Rev. (1926) 533, 548.

[6]The State courts placed some reliance on *Campbell* v. *Holt,* 115 U. S. 620. Whether, as there held, a statute of limitations may also be lengthened so as to affect liabilities already barred is not here pertinent. There is a clear difference between the revival of a liability which is unenforcible only because a statute has barred the remedy regardless of the will of the parties, and the extension of a liability beyond the limit expressly agreed upon by the parties. Compare *National Surety Co.* v. *Architectural Decorating Co.,* 226 U. S. 276, 282; *William Danzer & Co.* v. *Gulf Island R. R. Co.,* 268 U. S. 633, 636.

local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred.[7] In such cases, the rights and obligations of the parties are not varied. When, however, the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for.

It is true also that a State is not bound to provide remedies and procedure to suit the wishes of individual litigants. It may prescribe the kind of remedies to be available in its courts and dictate the practice and procedure to be followed in pursuing those remedies. Contractual provisions relating to these matters, even if valid where made, are often disregarded by the court of the forum, pursuant to statute or otherwise. But the Texas statute deals neither with the kind of remedy available nor with the mode in which it is to be pursued. It purports to create rights and obligations. It may not validly affect contracts which are neither made nor are to be performed in Texas.

Third. Dick urges that Article 5545 of the Texas law is a declaration of its public policy; and that a State may properly refuse to recognize foreign rights which violate its declared policy. Doubtless, a State may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy; and, under some circumstances, it may refuse to aid in the enforcement of such rights. *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274, 277-9; *Union Trust Co.* v. *Grosman*, 245 U. S. 412; compare *Fauntleroy* v. *Lum*, 210 U. S. 230. But the Mexican corporation never was in Texas; and neither it nor the garnishees invoked the aid of the Texas courts or the Texas laws. The Mexican corporation was not before the court. The garnishees were brought in by compulsory process. Neither has asked favors. They ask only to be let alone. We need not consider how far the State may go in imposing restrictions on the conduct of its own residents, and of foreign corporations which have received permission to do business within its borders; or how far it may go

[7]Whether a distinction is to be drawn between statutes of limitation which extinguish or limit the right and those which merely bar the remedy, we need not now determine. Compare *Davis* v. *Mills*, 194 U. S. 451 and *Texas Portland Cement Co.* v. *McCord*, 233 U. S. 157 with *Canadian Pac. Ry. Co.* v. *Johnston*, 61 Fed. 738.

in refusing to lend the aid of its courts to the enforcement of rights acquired outside its borders. It may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.

Fourth. Finally, it is urged that the Federal Constitution does not require the States to recognize and protect rights derived from the laws of foreign countries—that as to them the full faith and credit clause has no application. See *Aetna Life Ins. Co.* v. *Tremblay*, 223 U. S. 185. The claims here asserted are not based upon the full faith and credit clause. Compare *Royal Arcanum* v. *Green*, 237 U. S. 531; *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544. They rest upon the Fourteenth Amendment. Its protection extends to aliens. Moreover, the parties in interest here are American companies. The defense asserted is based on the provision of the policy and on their contracts of reinsurance. The courts of the State confused this defense with that based on the Mexican Code. They held that even if the effect of the foreign statute was to extinguish the right, Dick's removal to Texas prior to the bar of the foreign statute, removed the cause of action from Mexico and subjected it to the Texas statute of limitation. And they applied the same rule to the provision in the policy. Whether or not that is a sufficient answer to the defense based on the foreign law, we may not consider; for, no issue under the full faith and credit clause was raised. But in Texas, as elsewhere, the contract was subject to its own limitations.

Fifth. The garnishees contend that the guaranty of the contract clause relates not to the date of enactment of a statute, but to the date of its effect on contracts; that, when issued, the policy of the Mexican corporation was concededly not subject to Texas law; that, although the statute relied upon by Dick was passed prior to the making of the contract, it did not operate upon the contract until this suit was brought in the Texas court; and that, hence, the statute violates the contract clause. Since we hold that the Texas statute, as construed and applied, violates the due process clause, we have no occasion to consider this contention. Nor have we considered their further contention, in reliance upon *Morris & Co.* v. *Skandinavia Ins. Co.*, 279 U. S. 405, that there was lack of jurisdiction over them for purposes of garnishment, because the authorization of service upon their local agents is limited to suits brought against them as defendants. For, this objection was not made or considered below on constitutional grounds.

Reversed.